

CASES DETERMINED

BY THE

SUPREME COURT

OF

The State of Missouri

AT THE

APRIL TERM, 1884.

(Continued from Volume 81.)

FULKERSON et al., Appellants, v. MITCHELL et al.

1. **Practice, Civil: PLEADING: EVIDENCE.** A party cannot complain of the refusal of the trial court to strike out defenses contained in the answer, where the latter also contains a general denial, and evidence as to such defenses is admissible thereunder.
2. **Ejectment: STATUTE OF LIMITATIONS.** The statute of limitations not only bars plaintiffs' recovery in an action of ejectment, but it also confers title on the occupant, which he may show under a general denial.

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3. **Practice in Supreme Court: FINDING OF FACTS BY TRIAL COURT.** The Supreme Court will not, in ejectment, disturb the finding of the trial court as to the fact of the execution and delivery of an alleged lost deed, where the evidence is conflicting and contradictory, and tends to prove both sides of the issue, unless the finding is caused by some error or misdirection of law.

Appeal from Johnson Circuit Court.—HON. A. W. ROGERS,
Special Judge.

AFFIRMED.

S. P. Sparks for appellants.

The decision of the court is in conflict with the case of *Swartz v. Chappell*, 19 Mo. 304. The court should have sustained plaintiffs' motion to strike out parts of the answer. This court cannot assume that the refusal of the court to sustain the motion to strike out was harmless error. *Yelverton v. State*, 40 Mich. 540; *Holmes v. Doane*, 9 Cush. 135; *Gill v. Read*, 5 R. I. 343; *Wiseman v. McNally*, 25 Cal. 234; *Boyden v. Moon*, 5 Mass. 365; *Kenyon v. Rastall*, 4 T. R. 753; *Penn. v. Zeebe*, 23 Pa. 323; *Calcraft v. Gibbs*, 5 T. R. 19; *Geer v. Archer*, 2 Barb. 420.

John F. Philips with *John J. Cockrell* for respondents.

The court properly refused the third instruction asked by plaintiffs, it was unnecessarily cumulative. *Miller v. Tilman*, 61 Mo. 316; *Martin v. Smylee*, 55 Mo. 577; *State v. Miller*, 67 Mo. 604. It was also erroneous in being limited to a partial view of the facts and acts in evidence. *Himes v. McKinney*, 3 Mo. 382; *I. M. Bank v. Murdock*, 62 Mo. 70. From 1857 to 1870 the facts and acts in proof would authorize a jury to find an adverse possession in Cockrell. *Ewing v. Burnett*, 11 Pet. 52, 53; *Draper v. Shoot*, 25 Mo. 197; *St. Louis Pub. School v. Risley*, 40 Mo. 357; *Wall v. Shindler*, 47 Mo. 283, 284. On the whole record the finding of the court was for the right party, and was just such a conclusion as any court or jury would reach.

RAY, J.—This is an action of ejectment for the northwest quarter of the southwest quarter of section 10, township 46, range 27 in Johnson county, Missouri. The petition is in the usual form. Suit was brought May 7th, 1878, against defendant, Mitchell, alone. Afterwards Moses Keim, as landlord, on his own motion, was made co-defendant with Mitchell, his tenant.

The substance of the amended answer upon which the case was tried is as follows: 1st, A general denial; 2nd, The statute of limitations; 3rd, It is then charged at length and in detail that J. M. Fulkerson, who is admitted to be the common source of title, in June, 1857, by way of exchange, sold and conveyed the land in controversy by deed in due form to one J. V. Cockrell who at the same time in exchange therefor sold and conveyed to said J. M. Fulkerson the southeast quarter of the northwest quarter of same section, township and range; that in May, 1858 said Cockrell, for a valuable consideration, sold and conveyed the land in suit to one Josiah Keim, who in April, 1865, for like consideration, sold and conveyed the same to the defendant Moses Keim; that all these several deeds were duly recorded, except the deed from J. M. Fulkerson to J. V. Cockrell which together with the house of said Cockrell in 1862, was burnt up and destroyed and never recorded; that at the date of the several deeds the grantees therein respectively took possession of said land, paid the taxes thereon, did various acts of ownership and possession in and upon said land, such as digging ditches, mowing grass, grazing stock, having the same surveyed and establishing its corners, selecting building sites, hauling and depositing rails thereon for fencing the same, and during their several ownerships and possessions, openly, notoriously and continuously claimed and asserted title to the same from the time of the first purchase or exchange down to the present; that said J. M. Fulkerson had notice of all said purchases, of the possession, acts of ownership, claim and assertion of

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title of all of said occupants as they severally occurred; that in May, 1878, the said J. M. Fulkerson, who is the father of the plaintiffs, without any consideration therefor, made to said plaintiffs a voluntary conveyance of said land; that said plaintiffs are not purchasers for value, are mere volunteers and had notice of all said deeds, purchases, possessions, acts of ownership, claim and assertion of title of all said parties, including the unrecorded deed of their father to said Cockrell, at and before the making and delivery of the deed from their father to them, etc.

The plaintiffs moved to strike out of said answer all that part contained in the third part thereof as above set out for the reasons; 1st, That the matters and things therein stated constitute no other or different defense than that contained in defendants first defense set up; 2nd, That the relief therein asked, the answer shows defendants are not entitled to. This motion was overruled by the court, and plaintiffs excepted. The reply was a general denial of the new matter set up in the answer.

By agreement of parties, the cause was tried before A. W. Rogers, special judge, without a jury. On the trial, as appears by the bill of exceptions, the plaintiffs to sustain the issues on their side offered and read in evidence a deed for said land from their father, J. M. Fulkerson, and wife to them. It was then admitted that J. M. Fulkerson was the common source of title, and the plaintiffs rested. The defendants to sustain the issues on their part thereupon introduced a large mass of evidence consisting of depositions, oral testimony of witnesses, deeds, etc. Of this evidence it is sufficient for the purpose of this case to state that it tended very strongly, we think, to show the execution and delivery of the unrecorded deed for said land from J. M. Fulkerson to said Cockrell, and its probable loss and destruction as charged in the answer. It, also, tended to show that the deed under which plaintiffs claim the land was a voluntary deed on the part of the father to the sons, and without any consideration paid therefor

by the sons. In deed, the father in his testimony on this point uses this language: "My object in conveying it to plaintiffs was to let them have it. I am getting old and feeble, and I thought they were young and could attend to the suit for recovering it better than myself." This evidence further tends to show various acts of ownership and some acts of possession done upon and about said land by Cockrell and those claiming under him, such as paying the taxes, digging ditches, depositing rails, cutting hay, grazing stock, surveying the same and establishing its corners, as well as claiming and asserting title to the same continuously and openly from the date of the purchase by Cockrell to that of the institution of this suit. This testimony however, discloses the fact that no inclosures or buildings were ever actually placed or built around or upon the land and that no part of it was ever put in cultivation, that no plowing was done thereon, except the furrow or ditch that was plowed or dug along the east side thereof to separate the same from the land of said J. M. Fulkerson.

On the other hand, the plaintiffs in rebuttal introduced a large amount of testimony tending to show that no deed whatever for said land was ever made by J. M. Fulkerson to said Cockrell. This testimony, also, tended to show that said J. M. Fulkerson claimed and asserted title to said land, that he cut grass and grazed stock on the same, and further that said tract of land during all the time was in a wild state and entirely without any actual possession, improvements, fencing, buildings or cultivation of any sort. On most all the material points, the evidence on both sides was contradictory and conflicting. At the close of the testimony the plaintiffs asked the court to declare the law as follows, to-wit:

1. The court declares the law to be that it is admitted by the pleadings and evidence in this case that J. M. Fulkerson, the grantor of plaintiffs, is the common source of title and that so long as such legal title remained in said Fulkerson, such title drew to it the seizin or possession in

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law, and although the court may find that one J. V. Cockrell on the 25th day of May, 1858, executed, acknowledged and delivered to defendant's predecessor and grantor, Josiah Keim, a deed for the land in controversy; that the execution and delivery of such deed did not operate to give said Keim the possession of said premises unless the said J. V. Cockrell had the legal title thereto, or was in the actual possession thereof, and that in order to disseize the true owner of said premises it required an entry upon said premises and actual occupation of some part thereof, or the doing acts on and respecting said land with the knowledge of the true owner, hostile to his title and his acquiescence therein.

2. The court declares the law to be that defense of the statute of limitations is one in derogation of right, and is not to be made out by inference, but only by the strictest proof, and before it can sustain such defense against the action of plaintiffs in this case, it must find that the defendants and those under whom they claim have had and held, not only an open, visible, notorious and adverse possession, but also a continuous possession for the statutory period of ten years at some time before the commencement of plaintiffs' suit, and if the court should find from the evidence that possession relied on by defendants was broken, interrupted and intermitted from the year 1861 to 1865, or for any other definite period, then the court must find that any possession taken subsequent to such interruption was a new and distinct possession, and cannot be tacked to any possession prior to such interruption, in making out the requisite period of ten years, and if the adverse possession at the time of such break or interruption had not ripened into a title, it was at an end, and a subsequent possession must be in itself for the full statutory period, or the court will find that there is no title in defendants, or right to possession in them, and plaintiffs must prevail.

3. Although the court may believe from the evidence in the case that the defendants, and those under whom

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they claim title by adverse possession, may have gone on and over the premises in controversy, and claimed to own the land and selected a site on which to build a house, and paid taxes for several years, and asserted such claim continuously for a period of ten years adversely to all the world, yet if the court should find that there was no actual or visible possession of such premises during the assertions of such possession, and title in themselves, then the court will find for plaintiffs as to such defense of the statute of limitations, unless the court should believe and find from the evidence that the plaintiffs, or their grantor, had actual knowledge of such claim of title and acts of ownership by the defendants and their grantors, and acquiesced in the same.

The court gave the first and second of said instructions and refused the third, and the plaintiffs excepted.

The defendants asked the following instructions, to-wit:

1. If the court hearing this cause believes from the evidence that James M. Fulkerson, the grantor of plaintiffs, in 1857 or 1858, agreed with J. V. Cockrell to exchange the northwest quarter of the southwest quarter of section 10, township 46, range 27, for the southeast quarter of the northwest quarter, same section, township and range, owned by said Cockrell; and that said Cockrell thereupon made and delivered to James M. Fulkerson a deed for the said southeast quarter of the northwest quarter, in consideration that James M. Fulkerson would convey to him the said northwest quarter of the southwest quarter, and that James M. Fulkerson thereupon made and delivered to said Cockrell a deed therefor, and that defendants claim title and hold possession under said Cockrell, the plaintiffs cannot recover. And in determining the question as to whether such deed was made by James M. Fulkerson to said Cockrell, the court will take into consideration all the facts and circumstances in evidence, and the subsequent conduct and admissions, if any, of James M. Fulkerson.

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2. Even should the court find the issues for the plaintiffs, as presented in the foregoing instructions, yet if the court further finds from the evidence, that for ten years next before the institution of this suit by plaintiffs, to-wit, the 7th day of May, 1878, the defendant, Mitchell, and those under whom he claims, had been in the uninterrupted, notorious, open and adverse possession of the land in controversy, under claim of title in fee, then the court will find the issues for the defendants.

Which instructions the court gave, and plaintiffs excepted.

Whereupon, as the record shows, the court having heard the arguments and being fully satisfied as to the matters in controversy, finds the issues for the defendants and renders judgment accordingly. The plaintiffs thereupon, after an unsuccessful motion for a new trial, bring the case to this court by appeal. The errors mainly relied on by plaintiffs for a reversal, in this cause are: 1st, The refusal of the court to strike out parts of the answer; 2nd, The refusal of plaintiffs' third instruction; 3rd, The giving of the first and second instructions for defendants. Some exception also is taken to the form and sufficiency of the findings of the court. We will notice these objections in their order.

The ground of the objection to strike out is, that the matters and things stated constitute no other or different defense than that contained in their first defense, and contain nothing but the evidence upon which they base their case. If that be true, it may have been error not to strike it out, but by no possibility could the plaintiffs have been prejudiced thereby, since the facts were equally admissible in evidence under the general issue, whether the third part of the answer was in or out. The same may also be said of the second defense, or the statute of limitations. It is now the well settled law of this state that a defendant in an action of ejectment need not plead the statute of limitation. The doctrine now is, that the statute not only bars

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plaintiff's recovery, but also confers title upon the occupant, which he may show under the plea of the general issue. *Ridgeway v. Holliday*, 59 Mo. 444; *Barry v. Otto*, 56 Mo. 177; 47 Mo 282; *Nelson v. Brodhack*, 44 Mo. 596; 16 Mo. 166; 53 Mo. 307; 51 Mo. 336; 50 Mo. 407. Under this plea it was competent for the defendant in this cause to prove either the making and delivery of the alleged unrecorded deed from Fulkerson to Cockrell and conveyances thereunder to defendants, as set out in the third part of the answer; or the statute of limitation, set up in the second part of the answer. The proof of either equally showed that the legal title to the land in controversy was in the defendants, and not in the plaintiffs, and, therefore, plaintiffs could not recover. In strictness, therefore, there was really but one issue in this cause and that was, who had the legal title, the plaintiffs or the defendants. This was really the only issue in the cause, and the matters set up in the second and third part of the answer only constituted the evidence by which the defendants proposed to prove that issue. This issue the record shows the court found for defendants. If this issue under a proper instruction and competent evidence was rightfully found for the defendants, of which, we think, there can be no doubt, the findings on other issues not material to the case can afford no just or sufficient cause for a reversal. It is manifest, we think, that if the existence of the unrecorded deed from Fulkerson to Cockrell (which appears to have been the turning point in the case) is proved to the satisfaction of the court, and the court so finds, then the question of the statute of limitation was wholly immaterial, and cuts no figure in the case. If that be so, instructions on that question are equally immaterial and, whether erroneous or not, could not in a case like this possibly prejudice the rights of the plaintiffs, or furnish any sufficient cause to reverse the judgment of the trial court.

It only remains, therefore, to determine the propriety of the first instruction for the defendants and the finding of

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the court thereon. It is conceded on all hands, in the court below, as well as here, that the plaintiffs are not purchasers for value, and that the deed from their father under which they claim is a voluntary deed, without the payment of anything therefor. It is further conceded by the appellants that if the existence of the Fulkerson-Cockrell deed is proved to the satisfaction of the court by competent evidence, that ends the case and there can be no cause for a reversal. The only objection urged to the first instruction for defendants is as to the latter clause thereof. The remainder of the instruction plaintiffs concede to be correct, but insist that it is erroneous in that part where it is stated, that in determining the question whether appellants' grantor, J. M. Fulkerson, had executed the deed to Cockrell, the court should take into consideration all the facts and circumstances in evidence with subsequent conduct and admissions, if any, of J. M. Fulkerson. We see no possible objection to this part of the instruction under the facts and circumstances in this record. The subsequent conduct and admissions of Fulkerson to witness Snow, as well as other facts and circumstances in evidence tend strongly, if not conclusively, to prove that Fulkerson made and delivered the deed in question to Cockrell. Indeed when inquired of by Snow for this missing deed, Fulkerson told Snow that he had no claim to the land, that there was a ditch dividing his land from the Keim land; that he had sold the land to Cockrell and did not lay any claim to it. Cockrell in his testimony expressly testifies to the making and delivery of the deed in question. This, however, is expressly denied by Fulkerson in his testimony, but we think the weight of evidence greatly preponderates in favor of Cockrell's statement. But whether this be so or not, the settled practice of this court is in cases like this, when there is conflicting and contradictory evidence tending to prove both sides, not to disturb the finding of the trial court, unless that finding is brought about by some error or misdirection of the court. *Grove v. City of Kansas*, 75 Mo.

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672; *Hamilton v. Berry*, 74 Mo. 176; *Meyer v. McCabe*, 73 Mo. 236.

As no error appears in the record, the judgment of the circuit court is affirmed. All concur, except NORTON, J., who dissents.

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Contract, Construction of: BAILMENT. The Weir Plow Company made an agreement in writing with H., by the terms of which it was to manufacture and furnish to him certain farming implements; it also agreeing not to sell such implements to any one else in a designated county for the year 1876. H. was to sell the implements at a certain price, and to have a certain fee or commission for every sale; was required, when he sold on credit, to take notes of a particular character payable to the company, to which notes he was to add his own guaranty of payment: was to keep the notes of the company and business separate, and to remit the cash received by him each month for each implement sold for cash, and to hold himself ready for settlement by the 1st of July, 1876, or any time thereafter, when called upon by the company. It was further provided that if H. failed or neglected to sell all the implements so delivered to him, he was to settle for those remaining on hand by paying for them in notes, or to store them subject to the order of the company, whichever method of disposition the company might choose to accept, the whole agency being subject to revocation upon the failure of said H. to discharge his duties. *Held*, that the unsold implements did not vest in H., and that the contract as to them was one of bailment and not of sale, unless the company chose to make him vendee upon his offering his paper for their price, and did not choose to order the implements on storage for the future disposition of the company.

Appeal from Putnam Circuit Court.—HON. ANDREW ELLISON,
Judge.

REVERSED.

A. W. Mullins for plaintiff in error.

The trial court erred in excluding part of the deposi.

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tion of William B. Boyd offered by plaintiff. Story on Sales, § 400; *Ober v. Carson*, 62 Mo. 209. The contract constituted Harper the agent of plaintiff to sell the goods furnished under it. If there was a sale at all, it was incomplete and conditional that payment in a certain way would be offered and excepted, with the option remaining to plaintiff, to take back the goods and decline the sale. And as the payment was neither made nor offered to be made the title to the property never vested in Harper & Moore. Story on Sales, (3 Ed.) § 313 and note 2; Hilliard on Sales, (3 Ed.) p. 33; *Griffin v. Pugh*, 44 Mo. 326; *Little v. Page*, 44 Mo. 412; *Ridgway v. Kennedy*, 52 Mo. 24; *Sumner v. Cottey*, 71 Mo. 121; *Couse v. Fregent*, 11 Mich. 65; *Brewster v. Baker*, 20 Barb. 364; *Marston v. Baldwin*, 17 Mass. 606; *Buckmaster v. Smith*, 22 Vt. 203; *Hotchkiss v. Hunt*, 49 Me 213.

Smith & Krauthoff with *H. D. Marshall* for defendant in error.

The transaction had all the elements of a sale. *Fish v. Benedict*, 74 N. Y. 613; Benjamin on Sales, (3 Am. Ed.) 2; *Gardner v. Lane*, 12 Allen 39; 2 Schouler Per. Prop., 186, 190, 229. *Warder v. Hoover*, 51 Ia. 491; *Blow v. Spear*, 43 Mo. 406; *Audenreid v. Randall*, 3 Cliff. 99, 103; *Mahler v. Schloss*, 7 Daly 291; *Marsh v. McPherson*, 105 U. S. 709; *McArthur v. Wilder*, 3 Barb. 66; *March v. Wright*, 46 Ill. 487. The court correctly instructed the jury upon the question of a re-sale to the plaintiff. R. S., § 2505; *Wright v. McCormick*, 67 Mo. 426; *Stern v. Henley*, 68 Mo. 262; *Mills v. Thompson*, 72 Mo. 367. The contract between the parties was in writing, and it was not competent for witness Boyd to vary its terms by parol. *Rodney v. Wilson*, 67 Mo. 123; *Jones v. Shaw*, 67 Mo. 667; *Chrisman v. Hodges*, 75 Mo. 413; *Foster v. Ropes*, 111 Mass. 20; *Tingham v. Eggleston*, 27 Mich. 326.

MARTIN, C.—This was an action of replevin for fifteen turning plows and two sulky rakes of the Weir manufacture, valued at \$328. The property was originally manufactured and delivered to one S. A. Harper, under the following contract, which in its terms included beam cultivators and rakes, but which was by a list attached thereto, extended to the plows claimed in the petition:

"This article of agreement made this 7th day of December, 1875, by and between the said Weir Plow Company * * of the first part, and S. A. Harper * * of the second part, witnesseth: That the Weir Plow Company agrees to manufacture and furnish to the party of the second part, aboard the cars at Monmouth, Ill., on or before the 20th day of February, 1876, twenty-four wood beam cultivators, etc. Party of the first part further agrees to sell the above named implements to no other than the party of the second part, during the year 1876, in the following territory, viz: Putnam county, Missouri. The party of the first part further agrees to pay the party of the second part \$6.40 for selling each wood or iron beam cultivator, etc. Provided, each implement is sold at respective list prices before mentioned. All notes taken for the sale of the above implements to be made payable to Weir Plow Company, or order, bearing interest, from June 1st, 1876, or from date, at the rate of ten per cent. * * And provided further, that the party of the second part take no notes without their being signed by a resident land owner, or good and sufficient security, and guarantee their payment by indorsing them, waiving demand, notice of protest and non-payment. * * Said party of the second part agrees to sell the aforesaid number of implements as above stipulated, to keep all moneys and notes separate and apart from individual or company business, and to remit cash due each month for each implement sold for cash, to Weir Plow Company, at Monmouth, Illinois, and be ready to settle with the party of the first part by the 1st of July

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next, or at any time thereafter, when the party of the first part or their authorized agent may call upon the said party of the second part. * * The said party of the second part (Harper) agrees to represent each implement sold for cash, by the cash, at wholesale price, and each implement sold for note by note, at retail price, and indorsed as above stipulated, such notes as the party of the first part may designate sufficient in amount to pay for all implements not paid for cash, counting \$22.75 for each wood beam cultivator, etc. The said party of the second part further agrees that should he neglect or fail to sell all of said implements by the 1st day July, 1876, to settle for those remaining on hand by giving his note, payable to the Weir Plow Company, or order, due November 1st, 1876, or indorse and turn over farmers' notes as provided for payment of implements sold on time, as the party of the first part may elect; said notes to bear interest at ten per cent from maturity, or, if the party of the first part should so elect, to store and keep well housed, free of charge, implements unsold, subject to the order of the party of the first part.

The party of the first part reserves the right to revoke this agency and take possession of said implements and the proceeds of those sold, at any time the said party of the second part fails to discharge his duties as agent.

In testimony whereof the parties set their hands, day and date first above mentioned.

J. A. TEMPLETON, for
WEIR PLOW COMPANY,
S. A. HARPER.

The property thus delivered to Harper was attached by the defendant, as sheriff, under a writ of attachment against said Harper and W. G. Moore his partner, and in favor of Morrison and Morrison, their creditors. The only issue in the case relates to the right of property at the time of the levy.

John A. Templeton, in a deposition read in evidence,

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testified that he was traveling agent for the plaintiff in 1875 and 1876, and until June, 1877. That in December, 1875, he made a contract, as such agent, with S. A. Harper, under which the property in question was delivered to said Harper and went into the possession of Harper and Moore. A copy of said contract is annexed to the deposition. Deponent further stated: "My impression is, there was a settlement on the back of the contract, marked exhibit "B," made sometime in the month of August, 1876. I can't say the exact day. I think in the first of the month. That settlement was made by myself and Harper, at Unionville, Missouri. At this settlement I invoiced as the goods belonging to the Weir Plow Company, two sulky rakes," and the plows in question, naming them. "These goods, when turned over to me were left in the possession of Mr. Harper, subject to the order of the Weir Plow Company. I next saw the goods in Mr. Marshall's barn where they had been placed by the sheriff, G. W. Porter, defendant."

W. G. Moore, a witness for plaintiff testified: "I formed a co-partnership with S. A. Harper in the spring of 1876, I think in the month of March. We were engaged in the sale of agricultural implements, and had a light stock of hardware, at Unionville, Mo. For all goods sold by us on time, of the manufacture of the Weir Plow Company, notes were made payable to the company. We received some of the notes for our commission for selling the goods. All notes were taken in the name of the company, and those we received for our commission were indorsed to us by the company. Most of the goods were sold on time. * * There was a settlement made with the company sometime in August, 1876, at which they agreed to take back all goods remaining on hand unsold. After that we held them subject to the order of the company. * * The house in which the goods were at the time of the levy, was in the possession of James Turner, our assignee. I notified the sheriff at

the time he went to make the levy, that the goods of the Weir Plow Company make were not ours and never had been."

H. D. Marshall on behalf of defendant testified: "Harper sold the goods as his own, used them as such and was universally understood to be the owner. The Plow Company was not known in any regard as the owner. The goods claimed by the Weir Plow Company were mixed promiscuously with other goods of Harper & Moore in the building when attached, and in the hands of Turner, their assignee. They were never separated."

This was in substance all the evidence bearing upon the issue. The court, after giving several instructions on behalf of plaintiff, refused the following one:

"That if they believe from the evidence that the copy of the contract, read in evidence, was a true copy of the original contract between S. A. Harper and the Weir Plow Company, and that the goods in controversy in this suit were delivered to S. A. Harper and Moore under said contract, then said goods were held by Harper & Moore on commission, as agents of the Weir Plow Company, and they, Harper & Moore, were not the owners of said goods unless the Weir Plow Company, at the settlement made as provided for in said contract, elected to take farmers' notes, or the notes of Harper & Moore for said goods remaining on hands after said settlement."

At the instance of defendant, the court gave the following instruction: "That by the terms of the contract read in evidence, there was a sale of goods as between Harper & Moore, and the Weir Plow Company. If the jury believe from the evidence that said Harper & Moore took the plows under the same terms as those expressed in said contract, then said Harper & Moore were the owners of the same, and the finding of the jury should be for the defendant, unless the jury further believe from the evidence that after a settlement between the said Harper & Moore and the Weir Plow Company, the said company elected to

take back the plows, and the said Harper & Moore did store and keep the same housed for said plaintiff.

After the jury had retired they returned and reported that they could not agree, whereupon the court of its own motion added the following instruction: "The jury are further instructed that if they believe from the evidence the plows of the Weir Plow Company make were not separated from the balance of the stock after the alleged settlement between Harper & Moore and the said Company, but were left there in the same place, along with the other goods, then there was no sale back to the plow company. The jury then returned a verdict for the defendant, from which the plaintiff prosecutes his writ of error.

The material question for us to consider is, whether the instrument under which the implements were delivered is a contract of sale or a contract of bailment for purposes of sale. The court in its instructions construed the instrument as a contract of sale, by which the title to the implements passed to Harper upon delivery of them to him. If the title thus became vested in him, it may be admitted that under the evidence there was no valid resale, for the reason that there was no change of possession necessary to effect a transfer of title, as against creditors. After considering the language and evident intent of the instrument, I am constrained to disagree with the learned judge in his interpretation of it. I fail to discover in it the elements of either an absolute or conditional sale.

It is true that the plaintiff, according to the terms of the instrument, agreed to manufacture and furnish to Mr. Harper the implements covered by it, and not to sell them to any one else in Putnam county. This language of itself could not constitute a sale to Harper, in the absence of appropriate subsequent provisions to that effect. Now it happens, that all the subsequent provisions negative the inference of a sale to Harper, and constitute him a bailee or agent for the purpose of selling the implements to others, and accounting for the proceeds upon a commission at a

fixed sum for every implement sold by him. He is to sell at a certain price and have a certain fee or commission for every sale. He is required when he sells on credit to take notes of a particular character in return, payable to the company; to which notes he is to add his guaranty of payment. There is nothing unusual in thus requiring a factor or agent to guarantee his sales when made by him on credit. Such a requirement does not convert him into a vendee, as was done by the construction adopted by the court. Harper agrees on his part to make sales for the company, to keep their notes and business separate, and to remit the cash received by him each month for each implement sold for cash, and to hold himself ready for settlement by the first of July, 1876, or any time thereafter when called upon by the company.

It is further provided that if he fail or neglect to sell all the implements so delivered to him, he is to settle for those remaining on hand by paying for them in notes, or to store them subject to the order of the company, whichever of these two methods of disposition the company may choose to accept. The whole bailment or agency is subject to revocation upon failure of said Harper to discharge his duties as agent. I am unable to perceive how Mr. Harper, or his partner, can claim any right of property in the implements as against the company, under this contract and the evidence in the record. According to the obvious intent of the contract, the unsold implements did not vest in Harper and his partner unless the company should choose to make them vendees upon their offering their paper for the price thereof, and should not choose to order the implements on storage for the future disposition of the company.

Under the evidence the agents did not furnish their notes for the unsold implements, nor were they, or anything equivalent thereto, accepted by the company in consideration for a sale of them. On the contrary the property unsold was retained on storage for the company; and the

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assignee of the agents neither had or made any claim for it, as passing to him under a general assignment, which could legally pass nothing belonging to the company. There was not even a conditional sale of the unsold implements, because there was no condition within the possible power of Harper to perform which would give him the title. Any title to be acquired by him depended upon the election of the vendor whether it would make him a vendee, by accepting his paper for the purchase money, or decline doing this and order the goods to be retained on storage for the use of the company.

For the foregoing reasons, I am persuaded that the court erred in refusing the instructions asked by plaintiff, and in giving the instruction of its own motion to the effect that the instrument in evidence constituted a sale.

The judgment is reversed and the cause remanded. All concur.

MODRELL *et al.* Appellants, *v.* RIDDLE *et al.*

1. **Deed:** HUSBAND AND WIFE: SURVIVOR. By a deed executed to husband and wife they become seized in entirety of the land conveyed, and the survivor takes the whole estate.
2. **Husband and Wife, Money of Latter:** RESULTING TRUST, EVIDENCE TO ESTABLISH. Prior to the act of 1875, money of the wife, not her separate estate, became the property of the husband *jure mariti*, and if invested in land by him, no resulting trust would be thereby credited in favor of the wife or those claiming under her. To establish such a trust the evidence must be clear, strong and unequivocal; loose declarations of the husband are not sufficient, and testimony of verbal admissions of persons since dead is entitled to but small weight.
3. **Mistake in Written Conveyance, Evidence to Establish.** It requires the same strength of evidence to establish a mistake in a written conveyance as to establish a trust.

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Appeal from Buchanan Circuit Court.—HON. WM. H. SHERMAN, Judge.

AFFIRMED.

Plaintiffs read in evidence a deed containing covenants of general warranty, executed March 29th, 1865, by Uriah Griffith and wife to Hardin Riddle and Mary Riddle conveying the land described in the petition. This deed was duly recorded April 8th, 1865. Plaintiffs further offered oral evidence to the effect that Mary Riddle furnished the money to pay for the land in question, and that she objected to the deed to Hardin Riddle and herself, and wanted the deed made to herself alone, giving her husband, Hardin Riddle, only a life interest in it, and it was agreed that a second deed such as she desired should be made. That Hardin Riddle, after the death of his wife, endeavored to purchase the interest of his wife's children by a former husband, and that he admitted to various persons, before and after the death of his wife, that he only had a life estate in the land. Defendants' testimony was, in substance, that Hardin Riddle stated to several persons that the land in controversy was his wife's, that her money bought it, and he only had a life interest in it. To others he claimed the land as his. That he sold a farm in 1865 for \$1,600, and then moved on to the land in controversy. That he lived on it about thirteen years and made additions to the house and otherwise improved the land. Defendants read in evidence insurance policies and tax receipts, showing that Hardin Riddle twice insured the house and paid the taxes on the land; and, also, read in evidence a writing purporting to be a deed from Uriah Griffith and wife, but not the one read by plaintiffs, conveying the land in controversy to Hardin Riddle and Mary Riddle, and purporting to have been acknowledged before Allen Jamison, a justice of the peace. The plaintiffs, in rebuttal, introduced Allen Jamison, who testified that he never took the acknowledgment

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to the deed read by defendants, and that the name signed to the certificate of acknowledgment was not in his handwriting.

James W. Boyd and B. R. Vineyard for appellants.

Mary Riddle paid for the land, and hence a trust resulted by which Hardin Riddle held it as trustee for her and her heirs. *Tennison v. Tennison*, 46 Mo. 77; *Darrier v. Darrier*, 58 Mo. 222. It is contended that this money belonged to Hardin Riddle by virtue of his marital rights. This would not be so unless he received and held it with the intention of becoming the owner of it. If it was her money, and he reduced it to his possession, the law then offered to give it to him, leaving it optional with him to accept or decline it. The law did not both offer it to him, and then compel him to receive and own it. If he received it without any intention to own it, it did not become his. This doctrine is abundantly sustained, by many cases among which are the following, all to the point: *Noble v. Morris*, 24 Ind. 478; *Standeford v. Devol*, 21 Ind. 404; *Gochenaur's Estate*, 23 Pa. St. 460; *Bargey's Appeal*, 60 Pa. St. 408; *Tracy v. Kelly*, 52 Ind. 535. The second ground upon which we ask for such a decree is, Hardin Riddle's name was written in said deed as a grantee by mistake, neither he nor his wife being able to read. Even if this court shall determine that Hardin Riddle, by his marital rights, received the money with which this land was purchased, still if he purchased it for her with this money, and intended it to be conveyed to her, and his name was written in the deed by mistake, then the deed ought to be corrected. The defenses set up are the statute of limitations and that "plaintiffs' pretended claim is stale." They are not sustained. The statute did not begin to run till Hardin Riddle died, 1878, and there was no stale demand. *Dyer v. Brannock*, 66 Mo. 391; *Kelley v. Hurt*, 61 Mo. 463; *Spurlock v. Sproule*, 72 Mo. 503; *Miller v. Bledsoe*, 61 Mo. 96.

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Plaintiffs did not know until after Hardin Riddle's death that his name was in the deed. Under the facts in this case plaintiffs have a right to relief in this suit. *Griffith v. Townley*, 69 Mo. 13; *Lewis Evants v. Admr. &c. of Strode*, 11 O. 480; 1 Story's Eq. Jur., § 134 and 480. Acts done and declarations made by one in possession of property against his interest are evidence against himself and those claiming under him, while those made in support of his title are not admissible in his favor, nor in favor of those claiming under him. *Criddle v. Criddle*, 21 Mo. 522; *Wood v. Hicks*, 36 Mo. 326. The court below erred in admitting in evidence the declarations of Hardin Riddle in support of his title. The trial court committed error in overruling plaintiffs' objection to the testimony of defendant, Anna Riddle. She was not a competent witness in the case, and certainly not to prove the declarations made to her by her husband. *Holman v. Bachus*, 73 Mo. 49; *Moore v. Wingate*, 53 Mo. 398.

Ramey & Brown for respondents.

(1) All personal property (other than separate property) of a wife, whether owned at the time of marriage or afterwards acquired, vests absolutely in the husband. *Woodford v. Stephens*, 51 Mo. 443; *Boyce v. Cayce*, 17 Mo. 47; *Walker Adm. v. Walker*, 25 Mo. 367; *Polk Adm. v. Allen*, 19 Mo. 467; *Clark v. The National Bank of Missouri*, 47 Mo. 17. The reception of such property by the husband does not establish a trust against the husband. *Woodford v. Stephens*, 51 Mo. 443, overruling *Tennison v. Tennison*, 46 Mo. 77. The evidence to establish such trust must be clear and unequivocal. *Woodford v. Stephens*, 51 Mo. 443; *Walker Adm. v. Walker*, 25 Mo. 367. Where a husband by means of marriage acquires absolute right to personal property in possession he cannot be declared a trustee for his wife by loose and general remarks made in conversation, and such trust as to land must be manifested in writing.

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Woodford v. Stephens, 51 Mo. 443; *Walker, Admr. v. Walker*, 25 Mo. 367. The possession of such money or other personal property by the wife is the possession of the husband. *Walker Adm. v. Walker*, 25 Mo. 367. (2) Evidence, to authorize the correction of such mistake must be clear and unequivocal. *Downing v. McHugh*, 3 Mo. App. 594; *Bunse v. Agee*, 47 Mo. 270; *Able v. Insurance Co.*, 26 Mo. 56; 67 Pa. St. 462; Wharton on Evid. § 1019. Equity will not relieve against mistake when the complaining party had within its reach the means of ascertaining the true state of facts, and without being induced thereto by the other party, neglected to avail himself of his opportunities of information. *Brown v. Fagan*, 71 Mo. 563; Story's Eq. §§ 148, 150; *Bufork v. Caldwell*, 3 Mo. App. 447. (3) Equity will not relieve against a pure mistake of law. Story's Eq. §§ 111, 114; *Faust v. Birner*, 30 Mo. 414.

SHERWOOD, J.—This is an equitable proceeding brought in 1880 by plaintiffs as the children and heirs at law of Mary Riddle by a former husband, Modrell, and as the children and heirs at law of Mary Riddle by her second husband, Hardin Riddle. Mary Riddle died in 1867. Hardin Riddle married again. He died in 1878, leaving his wife, Ann Riddle, and child, Ellen Riddle, who are defendants herein. Plaintiffs seek to correct an alleged mistake made in a deed executed in 1865 by Griffith and wife to Hardin Riddle and wife, Mary Riddle, and which conveyed to them certain land in Buchanan county. The petition alleges that the land was purchased by Mary Riddle with her own separate money, that by reason of "mistake, error and oversight," the name of Hardin Riddle was inserted in the deed as one of the grantees, and the prayer of the petition is, that the name of said Riddle be stricken from the deed and the title of the land vested in the plaintiffs.

I. By the legal effect of the deed as drawn, Riddle and wife became seized in entirety of the land conveyed,

and the husband, as survivor, took the whole estate. *Hale v. Stephens*, 65 Mo. 670.

II. It was not established at the trial that the money of the wife, which it is claimed was used in purchasing the land in controversy, was her separate estate, and consequently that money became the property of the husband, unimpressed with any trust in his hands. It became his *jure mariti*, and if he invested it in the land, as claimed, there could be no resulting trust in favor of his first wife, or those claiming under her. *Woodford v. Stephens*, 51 Mo. 443. And evidence to establish such a trust must be clear, strong and unequivocal. *Woodford v. Stephens, supra*; so definite and positive as to leave no room for doubt in the mind of the chancellor. *Forrester v. Scoville*, 51 Mo. 268. And testimony, as to loose declarations of the husband as to the property being that of his wife, will not be sufficient for that purpose. *Woodford v. Stephens, supra*. And testimony of verbal admissions and statements of persons since dead, is entitled to but small weight in establishing such a trust. *Ringo v. Richardson*, 53 Mo. 385. And the same strength of evidence is necessary to establish a mistake in a written conveyance as to establish a trust. *Bunse v. Agee*, 47 Mo. 270; *Able v. Ins. Co.*, 26 Mo. 56. The evidence in this case on neither point comes up to the required standard.

III. Moreover, there is evidence tending very strongly to show that it was Hardin Riddle's own money, arising from the sale of his farm, which was applied to the purchase of the land in question.

Therefore the judgment, which went for the defendant, should be affirmed. All concur.

Briggs v. The Missouri Pacific Railway Company.

BRIGGS V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK: STATEMENT.** A statement under the double damage act, (R. S., § 809,) for killing a cow, which alleges that she went on the track where the road runs adjoining inclosed fields and uninclosed prairie lands, where the road was entirely uninclosed, is sufficient, although it does not aver that the cow went upon the track by reason of the same being unfenced.
2. ———: ———: ———. The first count of a statement under Revised Statutes, section 809, containing two counts, is not bad for failure to contain a prayer for relief, where it alleges the killing and value of the cow, and the second count concludes in the same manner, but is followed by a statement of the aggregate value of both animals, and asks for judgment for double that amount. The concluding paragraph is to be regarded as a part of each count.

Appeal from Bates Circuit Court.—HON. J. B. GANTT, Judge.

AFFIRMED.

Thomas J. Portis for appellant.

The complaint did not meet the statutory requirement in failing to contain a demand for relief. R. S., § 3511. It is required that each cause of action must be separately stated, with the relief sought for each cause in such manner that they may be intelligibly distinguished. R. S., § 3512; *Childs v. State Bank*, 17 Mo. 213; *Mooney v. Kennett*, 19 Mo. 551; *Simille v. Harrison*, 30 Mo. 228; *McCoy v. Yager*, 34 Mo. 134. A complaint based on section 809 must also meet the requirements of sections 3511 and 3512. *Barnett v. Railroad Co.*, 68 Mo. 56; *Gorman v. Railroad Co.*, 26 Mo. 450; *Parish v. Railroad Co.*, 63 Mo. 284. The statutory requirements must be complied with whether the action be commenced in a court of record or before a justice of the peace. The complaint did not do that in this case, and the court erred in receiving testimony to support

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its averments over defendant's objections. *Bates v. Railroad Co.*, 74 Mo. 60; *Schulte v. Railroad Co.*, 76 Mo. 324.

F. P. Wright and *C. A. Clark* for respondent.

The statement is sufficient. *Terry v. Railroad Co.*, 77 Mo. 254; *Chubbuck v. Railroad Co.*, 77 Mo. 591.

HENRY, J.—Plaintiff commenced this suit before a justice of the peace, under section 809 of the Revised Statutes, to recover double damages for the killing and injuring of a cow and steer belonging to him by defendant's train of cars. The following is the statement filed with the justice:

The plaintiff states that the defendant is a railroad corporation, running and operating a line of railroad lying in and running through the township of Osage, in Bates county, Missouri, and other townships. That on or about the 23d day of July, 1881, plaintiff's cow went on the track of said railroad within the said township of Osage, where said road runs adjoining inclosed fields and through uninclosed prairie lands, and where no fences were erected on the sides of the railroad, where said road was entirely uninclosed. That while said cow was on the track of defendant's railroad, defendant struck and injured said cow with its locomotive and cars, so as to render her worthless. The said cow was, at the time she was killed by defendant, worth the sum of \$40.

Plaintiff further states that on or about the 2d day of July, 1881, he was the owner of a steer of the value of \$25, that on or about said day said steer went upon the track of defendant's railroad in said township and where said road lies and runs through uninclosed prairie lands and where defendant had wholly neglected to fence its railroad, at a point about one mile north of Rich Hill depot on said road. That said steer went upon said railroad track by reason of the same being unfenced. That while said steer

was upon said railroad as aforesaid he was struck by defendant with its locomotive and cars and injured so as to render him worthless, to plaintiff's damage of \$25.

Plaintiff says that by the injuring of said cow and steer he is damaged in the total sum of \$65, wherefore he asks judgment against the defendant for double the amount of said damages, to-wit: \$130, together with costs of suit.

Defendant moved to dismiss, on the ground that the statement alleged no facts which showed it to be the duty of defendant to fence its road at the point where the cattle got on the track, and again, for the same reason, objected to the introduction of any evidence, which was, also, overruled and an appeal from the judgment obtained by plaintiff.

The first count alleges that the cow went on the track where it runs adjoining inclosed fields and through uninclosed prairie lands, where the road was entirely uninclosed. It does not allege that she went upon the track by reason of the same being unfenced. But in *Edwards v. K. C., St. Jo & C. B. R. R. Co.*, 74 Mo. 122, a statement was held sufficient in which it was alleged that the animal strayed upon defendant's track at a point where it ran through and adjoining inclosed and cultivated fields, and the court, Hough, J., observed: "There is no express allegation that the cow got upon the track in consequence of the failure of the defendant to erect or maintain fences and cattle-guards as required by the statute; but we think the averments quoted, if not equivalent to such an allegation, will at least warrant the inference that the cow got upon the track by reason of the failure to fence." There is no material difference between the words "getting on the track" and "straying on the track," in their application to the voluntary movements of cattle.

This specific objection to the first count of the statement is not applicable to the second. But appellant's counsel contends that the first count is bad because it contained no prayer for relief, but only alleges the killing and value

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of the cow. The second concludes in the same manner, but is followed by a statement of the aggregate value of the two animals, and asks for a judgment for double that amount. It would have been more formal to conclude each count with a prayer for the amount plaintiff was entitled to recover on it, but the concluding paragraph of the statement may be regarded as part of each count and a very simple addition of figures would show precisely the amount of damages claimed on each count.

The judgment is affirmed. All concur.

CARLISLE *et al.* v. THE KEOKUK NORTHERN LINE PACKET COMPANY, *Appellant*.

1. **Pleading: NEGLIGENCE.** A petition which charges, in substance, that the defendant did not exercise due and proper care in the carriage of plaintiff's hogs, but on the contrary its officers, servants and agents carelessly, improperly and negligently managed and conducted defendant's steamboat, by reason of which careless, negligent and improper conduct of defendant, its officers, servants and agents said hogs were destroyed by fire and wholly lost to plaintiff, is sufficient.
2. **Practice in Supreme Court: INSTRUCTIONS.** The Supreme Court will not consider any objection to instructions which is made for the first time in that court. It is not error to refuse instructions when there is no evidence upon which to base them, or where they ignore material issues in the case or are embraced in others given.

Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

AFFIRMED.

Fagg & Hatch and *M. G. Reynolds* for appellant.

1. The petition does not state facts sufficient to constitute a cause of action. *Waldhier v. Railroad*

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Co., 71 Mo. 514. 2. The court erred in giving instruction number four, in behalf of plaintiffs, because it made defendant liable, even though guilty of no negligence, in the origin of the fire, or its efforts to extinguish it. 3. The court erred in giving instruction number five, in behalf of plaintiffs, as to the measure of damages, in peremptorily directing the jury, if they found for plaintiffs, to find interest on the amount at six per centum per annum. *Marshall v. Schrieker*, 63 Mo. 308; *Kenney v. Railroad Co.*, 63 Mo. 99; *Atkinson v. Railroad Co.*, 63 Mo. 367; *Myer v. Railroad Co.*, 64 Mo. 542; *DeSteiger v. Railroad Co.*, 73 Mo. 33; *Sparr v. Wellman*, 11 Mo. 230; 3 Parsons on Contracts, (6 Ed.) 105; *Atchison v. Steamboat Dr. Franklin*, 14 Mo. 63; *Dozier v. Jarman*, 30 Mo. 216. The court erred in refusing defendants instruction No. 4, because it properly declared the law.

Anderson & Boulware for respondents.

1. The petition is sufficient. *Schneider v. Railroad Co.*, 75 Mo. 295. It is unlike that in *Waldhier v. Railroad Co.*, 71 Mo. 514. 2. Plaintiff's instruction No. 4, was proper. 3. Plaintiffs' instruction No. 5 is correct. It is well settled that in an action against a common carrier for failure to deliver goods according to contract, or for injuries to the goods during the transportation, resulting from the negligence of the carrier, interest is properly part of the damage. *Dunn v. Railroad*, 68 Mo. 278; *Gray v. Railroad Co.*, 64 Mo. 47 and cases cited. 4. Defendant's instruction No. 2 was properly refused.

EWING, C.—This suit was on a contract for the shipment of hogs for hire, and after necessary preliminary averments the petition proceeds: "And plaintiffs say that defendant did not deliver said hogs or any of them to plaintiff at said city of St. Louis, and did not exercise due and proper care in the carriage of the same; on the contrary, plaintiffs say

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that said steamboat and the machinery, furniture and equipments thereof were imperfect and insufficient; that defendant, its officers, servants and agents carelessly, improperly and negligently managed and conducted said steamboat, *Golden Eagle*, during her said voyage. And plaintiffs aver and charge that by reason of said insufficiency and imperfection of said steamboat, the machinery, furniture and equipments thereof, and by reason of said careless, improper and negligent conduct of defendant, its officers, servants and agents, the said steamboat, together with the said hogs to plaintiffs belonging, were on the morning of the 31st of May, 1880, destroyed by fire, whereby said hogs and every one of them were wholly lost to plaintiff."

I. It is insisted by the appellant that the petition does not state facts sufficient to constitute a cause of action. The substance of the charge is that "defendant did not exercise due and proper care in the carriage of the same; on the contrary * * that defendant, its officers, servants and agents carelessly, improperly and negligently managed and conducted said steamboat, *Golden Eagle*, during her said voyage. And the plaintiffs aver and charge, that by reason of said * * careless, improper and negligent conduct of defendant, its officers, servants and agents * * said hogs * * were * * destroyed by fire * * and wholly lost to plaintiff," etc. A very different statement of a cause of action to that in *Wildhier v. Railroad Co.*, 71 Mo. 514. In that case the petition is really unintelligible. It does not clearly show what the pleader was intending to allege. Here, while the true cause of action is somewhat obscured by unnecessary words and charges, yet when stripped of this surplusage, the main charge of the loss and damage by the carelessness and negligence of the defendant and its agents and servants remains. It is sufficient, we think, to notify the defendant what it must meet, while the evidence tends strongly to prove the averments of the petition and to show

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negligence on the part of the defendant's agents in the origin of the fire, in the failure to use reasonable efforts to extinguish it, and in failing to make reasonable efforts to save the hogs after the landing of the boat.

II. It is insisted by the appellant, in this court for the first time, that the court below erred in giving the fifth instruction asked by the plaintiff. But on the trial of the case no objection was made to the giving of any of the instructions for the plaintiff, nor exceptions saved to the ruling of the court. In the motion for a new trial the giving of instructions for the plaintiff is not insisted on as error. The refusal to give instructions numbered one and two asked by the defendant, is assigned for error in the motion for a new trial, but no complaint is made of any other instruction on either side, hence this court cannot consider any objection to instructions which is made for the first time here. *Matlock v. Williams*, 59 Mo. 105; *Cowen v. Railroad Co.*, 48 Mo. 556; *Boyse v. Burt*, 34 Mo. 74; *Gordon v. Gordon*, 13 Mo. 215; *Powers v. Allen*, 14 Mo. 367.

III. The motion for new trial assigns as error the refusal of the first and second instructions asked by the defendant. There was no evidence on which to base the first instruction, and, moreover, it ignored all evidence of negligence, except as to efforts made to extinguish the fire. So with the second; the jury are told that if the defendant's agents "used every effort in their power to extinguish the fire," they must find for the defendant. It leaves out of consideration any question of negligence as to the origin of the fire, and, also, any question of negligence as to reasonable efforts to save the hogs from the flames. Besides, these questions were fairly submitted to the jury in the third instruction given for the plaintiff and not objected to by the defendant.

The judgment is affirmed. All concur.

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THE STATE, *Plaintiff in Error*, v. DENGOLENSKY *et al.*

Pleading, Criminal: INDICTMENT: DISTILLED LIQUOR. An indictment may be good which fails to charge an offense in the language of the statute creating it, provided words of equivalent meaning and import be used. And where an indictment charges the sale of "intoxicating liquor, to-wit, one pint of whisky," etc., it sufficiently describes the offense of selling "distilled liquor," within the meaning of the statute.

Error to Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

D. H. McIntyre, Attorney General, and John R. Walker, for the State.

The indictment properly charges the offense prohibited by the statute. The statute, (R. S. 1879, § 1581), forbids the sale of any fermented or distilled liquor and the indictment charges the sale of intoxicating liquor, to-wit: whisky, brandy, wine, beer, lager-beer, ale and gin. Courts will take judicial notice that whisky and brandy are distilled liquors and wine, beer and ale fermented liquors. *State v. Williamson*, 21 Mo. 495; *Watson v. State*, 55 Ala. 158; *Wiles v. State*, 33 Ind. 206; *State v. Moore*, 5 Blackf. (Ind.) 118. And courts will take judicial notice of the fact that the above mentioned liquors are intoxicating. *Intoxicating Liquor Cases*, 25 Kan., 751; *Commissioners v. Taylor*, 21 N. Y. 173; *Schlicht v. State*, 56 Ind. 173; *People v. Wheelock*, 3 Parker's C. C. 9; *Egan v. State*, 53 Ind. 162; *Nevin v. Ladue*, 3 Denio., (N. Y.) 437. It makes no difference that the averment as to the particular kinds of liquor sold is laid under the *videlicet*. It is material and traversable where not inconsistent with and repugnant to what goes before. Here its office is to particularize and describe. *State v. Arbogast*, 24 Mo. 363. It would have been sufficient to charge defendants with selling one pint of whisky, one pint of beer, etc., without more. *State v.*

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Munger, 15 Vt. 290. It was not necessary that the indictment should follow the exact words of the act. It may use words which in their common acceptance mean the same thing. *State v. Watson*, 65 Mo. 115; *State v. Ware*, 62 Mo. 597; *State v. Melton*, 38 Mo. 368; *State v. Fogerson*, 29 Mo. 416; *Jones v. State*, 51 Miss. 718; *Perryman v. State*, 36 Tex. 321; *Taylor v. Com.*, 20 Gratt., (Va.) 825. The demurrer and the action of the court upon it form a part of the record proper, and there was no necessity for a bill of exceptions. Demurrers only go to defects appearing upon the face of a pleading. R. S., 1879, § 3515. This is the provision in civil practice, and it should be followed in criminal procedure. *State v. Weeks*, 77 Mo. 496; Bliss on Code Pleading, § 404, p. 479; *National Banking, etc., Co. v. Knaup*, 55 Mo. 154.

Cosgrove, Johnston & Pigott for defendants in error.

The circuit court properly sustained the demurrer to the indictment. *State v. Lises*, 58 Mo. 359. Whether whisky is a distilled liquor or beer a fermented liquor, is a question of fact to be submitted to a jury. *State v. Biddle*, 54 N. H. 379.

MARTIN, C.—The indictment in this case was presumably based upon section 1581 of the statutes, which prohibits the sale of “fermented or distilled liquors” on Sunday. R. S. 1879, § 1581. It charges the defendants with the offense of selling “intoxicating liquor” to-wit: one pint of whiskey, one pint of brandy, one pint of wine, one pint of beer, and one pint of ale for the price of five cents each, on the first day of the week commonly called Sunday. The defendants demurred to the indictment on the ground that they were not charged with the offense prohibited by the statute. The demurrer was sustained and the state prosecutes the present writ of error.

The point involved in this appeal was elaborately con-

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sidered in the case of *State v. Williamson*, 21 Mo. 496, by Leonard, J., who rendered the opinion of the court. In that case it was held that an indictment might be good which failed to charge the offense in the language of the statute, provided words of equivalent meaning and import were employed; and that an indictment charging the offense of selling "whisky," sufficiently describes the offense of selling "distilled liquor" within the meaning of the statute. In the recent case of *State v. Heckler*, 81 Mo. 417, a similar indictment was passed and accepted as sufficient by the court.

In the case of *State v. Lises*, 58 Mo. 359, an indictment in words identical with the one in this case was held to be insufficient. The point here involved does not seem to have been considered in the last mentioned case, and no allusion is made to the former case of *State v. Williamson*, decided by Judge Leonard. Under these circumstances, I do not think that it was the intention of the court to overrule or depart from the rule laid down in that case. For these reasons, I adhere to the rule in *State v. Williamson*, and decline to follow *State v. Lises*, as an authority on this point.

Judgment reversed and cause remanded. All concur.

SISK V. ROSENBERGER, *Appellant*.

1. **Principal and Surety:** NOTICE TO SUE FORMER: STATUTE. The requirement of the statute, (R. S., §§ 3896, 3897,) relating to the duty of a creditor to commence suit against the principal debtor within thirty days after a written notice from the surety to do so, is not complied with by merely commencing suit, but such suit must be proceeded in with due diligence, in the ordinary course of law, to judgment and execution against the principal debtor.
2. ———: ———: ———: WHEN MUST SUE IN THE CIRCUIT COURT. Where the creditor and surety reside in the same county, and the

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principal debtor in a different one, and the amount of the debt is within the jurisdiction of the circuit court, and the creditor, upon notice from the surety to proceed against the principal, may, therefore, sue both principal and surety jointly, in the circuit court of the county in which the latter resides, he should do so. He cannot, in such case, take judgment alone against the surety in a justice's court, unless the amount involved is within the exclusive jurisdiction of the justice.

Appeal from Montgomery Circuit Court.—HON. ELIJAH ROBINSON, Judge.

REVERSED.

W. H. Biggs and *Emil Rosenberger* for appellant.

This case falls within the doctrine announced in *Peters v. Linenschmidt*, 58 Mo. 464, and the trial court, therefore, erred in refusing the two instructions asked by defendant. The case of *Hughes v. Gordon*, 7 Mo. 297, is not an authority for plaintiff, for the notes involved in that suit being for \$20 each, were within the exclusive original jurisdiction of the justice.

T. J. Powell for respondent.

Plaintiff had the right to bring the suit before a justice of the peace, it being within his jurisdiction. *Hughes v. Gordon*, 7 Mo. 297; *Phillips v. Riley*, 27 Mo. 386; *Perry v. Barrett*, 18 Mo. 140. There was no law requiring the issuance of an *alias* writ, when it would necessarily be returned not served. It was the duty of the plaintiff to bring the suit in the first court having jurisdiction over the matter after being notified to bring it. *Stone v. Corbett*, 20 Mo. 35; *O'Fallon v. Kerr*, 10 Mo. 554.

PHILIPS, C.—This action was instituted in a justice's court on the 27th day of September, 1880, in Montgomery county, by the plaintiff, Simeon Sisk, against one C. E. Musler and the defendant, founded on a promissory note,

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executed February 7th, 1872, by said defendants to plaintiff for the sum of \$100, due one day after date, with ten per cent interest, to be compounded if not paid annually, etc. There were several credits entered upon the note leaving, however, a balance thereon due in excess of \$100, at the time of filing the same for suit.

The evidence at the trial showed, substantially, that on the 20th day of September, 1880, the defendant, Rosenberger, served notice, in writing, on the plaintiff, that he was surety only on said note, and requiring him to bring suit forthwith against the said Musler as the principal debtor therein, as provided by the statute in such case. Accordingly the plaintiff did bring this action in a justice's court in Montgomery county, where the plaintiff and the defendant Rosenberger resided. The evidence shows that said Musler then resided in St. Louis, and that plaintiff knew this fact when he brought suit. The writ of summons was duly served on the defendant, Rosenberger, but was returned *non est* as to said Musler. When the case was called for trial the plaintiff dismissed the action as to Musler, and took judgment alone against Rosenberger. From this judgment Rosenberger appealed to the circuit court, where on trial *de novo* the plaintiff again had judgment, and the defendant has appealed to this court from said judgment. The evidence quite clearly shows that the defendant was surety on said note for said Musler.

The defendant at the trial in the circuit court asked instructions to the effect, that if the court found from the the evidence that he was only surety on said note for Musler, and had given notice as provided by statute to plaintiff to bring suit thereon forthwith, and that plaintiff had brought suit in a justice's court against Musler and defendant, and dismissed the action as to Musler, as shown by the record, he could not recover. The court refused this declaration of law, and, sitting as a jury, rendered judgment on the facts against the defendant.

The object of the statutory provisions (R. S. 1879 §§

3896, 3897) was to enable the surety to protect himself against the suspected solvency of, as well as his contingent liability for the principal. The method is summary, and substitutionary for the ancient chancery remedy in such cases. On giving the notice to the creditor, he devolves upon him the imperative duty of bringing action on the note against the principal debtor within thirty days, if he would afterwards look to the surety for payment. The requirement of the statute is not met by merely commencing suit, but the suit must be "proceeded in with due diligence, in the ordinary course of law, to judgment and execution" against the principal. This question was very fully considered by this court in *Peters v. Linenschmidt*, 58 Mo. 464, in which it was held, that the creditor, in such case, must institute suit in thirty days, and must prosecute it to final judgment and execution, if he would hold the surety; and if he brings suit in the county where the surety resides, and directs writ of summons to another county where the principal resides, and the writ is returned *non est*, it is the imperative duty of the creditor to take out an *alias* writ for the principal and to continue the cause until the return day of the *alias* writ. when, if not found and served, the creditor may proceed to judgment against the surety alone. If, therefore, this suit had been instituted in the circuit court, where it might have been, it would have been exactly parallel in its facts with those of *Peters v. Linenschmidt*; and consequently the conduct of the plaintiff in dismissing his action as to Musler would have operated a discharge of the defendant as surety.

But, the plaintiff insists that as the amount of the note in question was within the jurisdiction of a justice's court, he had a right to select that jurisdiction, which was in the county where he and the surety resided, and as the process of summons could not go from said justice's court to St. Louis, he was justified in dismissing as to the non-resident principal, and taking judgment against the resident surety duly served. Reliance for this proposition is

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placed on the case of *Hughes v. Gordon*, 7 Mo. 297, in which it is held that the creditor had the right to sue the surety in the county in which they resided, and the action being brought in a justice's court, whose process could not reach the non-resident principal, he had a right to take judgment alone against the surety. But the language of the learned judge who delivered that opinion must be construed and understood with reference to the special facts of that case. The two notes sued on were for \$20 each, and the amount was therefore, exclusively within the jurisdiction of a justice of the peace. This statute, like others of a similar import, should be so construed as to make it reasonable, practicable and just in its application. In this spirit, it has been held that it did not require the creditor to pursue the principal out of the state, or his estate in the hands of his administrator, or the non-resident principal, under certain circumstances, in the forum of the county where he resides. *Perry v. Barrett*, 18 Mo. 140; *Phillips v. Riley*, 27 Mo. 386; *Hickam v. Hollingsworth*, 17 Mo. 475.

So on the other hand, under the invocation of this conservative spirit of construction, where the creditor, upon notice from the surety to proceed against the principal may sue both principal and surety in the county where the surety resides, he should do so. Here the circuit court of Montgomery county, where the creditor and surety resided, had jurisdiction over the amount of the note. The plaintiff could have sued the defendant in the circuit court, and sent summons to St. Louis for Musler and brought him into court. This course would have been just and reasonable to all concerned. It would have been a complete answer to the objection, if interposed by defendant, the surety, that plaintiff might have sued in a justice's court at an earlier day. The plaintiff knew when he brought this suit in the justice's court that Musler resided in the City of St. Louis. He knew he could not sue him in a justice's court in Montgomery county. By so suing he chose not to sue him at all, de-

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spite the notice served on him by the surety. Practically it was no suit against the principal. Having at his election two tribunals in his county, equally convenient and remedial to himself, one of which would have enabled him to protect the surety as contemplated by the statute, and the other would not, it was his duty, upon the plainest principles of fair dealing and equity, to have selected the forum which would have enabled him to respect the notice given him by the surety and execute the object of the statute.

On the evidence the circuit court should have found the issues for the defendant. Its judgment, therefore, should be reversed and the cause remanded, with directions to proceed in conformity with this opinion. All concur, except Norton and Sherwood, JJ., absent.

THE STATE *ex rel.* HOWARD V. SMITH, *City Auditor of St. Louis.*

St. Louis Criminal Court: JANITOR OF, RIGHT TO APPOINT. Under section 10 of the scheme for the separation of the city of St. Louis from St. Louis county, (R. S., pp. 1565, 1566,) and the ordinance of the city passed thereunder, the commissioner of the public buildings of said city, and not the St. Louis criminal court, has the right to appoint a janitor for said court.

Appeal from St. Louis Court of Appeals

REVERSED

Leverett Bell for appellant.

T. B. Harvey for respondent.

PER CURIAM.—This is a proceeding by mandamus, originally commenced in the St. Louis court of appeals, to com-

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pel.the respondent, the auditor of St. Louis, to draw two warrants on the treasurer of the city—one for \$17.81 and the other for \$55—in favor of the relator for services performed by him as janitor during the month of December, 1883, between the 22nd day thereof and the end of the month, and during the month of January, 1884, which services, it is claimed, were performed under an order of the criminal court of St. Louis appointing the relator janitor of the offices of the clerk of the circuit attorney and the judge and of the grand jury room. When that order was made the city of St. Louis had in its employment at the Four Courts building a janitor and four assistants, appointed by the commissioner of public buildings, with the approval of the president of the board of public improvements.

Section 10 of the scheme for the separation of the city and county of St. Louis transferred to the city all the public buildings controlled by the county within the city limits, and required the municipal assembly of the city to make provision for the management of said property. By an ordinance of the city it is made the duty of the commissioner of public buildings "to make all necessary arrangements and regulations for the care and cleaning of the city hall, the court house, jail and Four Courts," etc. And by the same ordinance he is authorized to appoint janitors for said buildings, subject to the approval of the president of the board of public improvements, and said janitors are required to give bond to the city in the penal sum of \$1,000, for the faithful performance of their duties. The court of appeals found that nothing whatever was shown, or charged against the integrity or capacity of Brown, the assistant assigned by the chief janitor, to the rooms in question, but that the judge and other officers of the criminal court preferred the relator, Howard, and were unwilling to trust Brown in the position; and the judgment in the court of appeals in relator's favor is based upon the ground that no appointment of a janitor for the criminal court not accept-

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able to the judge of that court is a proper appointment, and he may reject the appointee and appoint another.

We do not concur in that view of the law. The criminal court is a statutory court, deriving its jurisdiction and authority from the statute creating it, and can have no authority expressly withheld from it, or conferred upon another. Whether, if there was no provision of law for the appointment of a janitor for that court, the judge might appoint one, is not a question before us. For the purpose of the argument, that power in the court might be conceded; but the statute has given the control of the Four Courts building to the city, and the city has by ordinance, duly passed, provided for the appointment of janitors by the commissioner of public buildings, subject to the approval, not of the judge of the criminal court, or the circuit attorney, but of the president of the board of public improvements.

Whether, if an incompetent or unsuitable person should be appointed by the city authorities, the judge of the criminal court could reject him and appoint another, is another question not presented by this record, and it will be time enough to determine it when properly before us. We can readily see how an obstinate commissioner of public buildings can annoy and embarrass the judge of the criminal court by his appointment of a janitor, but cannot imagine why that officer, without any regard to the pleasure of the judge of the criminal court, but in disregard of his remonstrance, should appoint a person obnoxious to him and the other officers of that court; but the law has given him the power and the court cannot deprive him of it, or prevent him from arbitrarily and offensively exercising it. If the custodian of the records of that court feels that they are unsafe with such a janitor, he must adopt some legal measure for their security.

The judgment of the court of appeals awarding a peremptory writ of mandamus against the respondent is reversed

KOCHLING *et al.*, Plaintiffs in Error, v. DANIEL

Homestead: CONVEYANCE BY WIDOW: MINOR CHILDREN. It is no defense to an action of ejectment by the minor children for the recovery of the possession of the homestead, that the defendant claims title from a purchaser at a foreclosure sale under a mortgage given by the widow. Under Wagner's Statutes, page 698, section 5, the minor children, until they attain their majority, are entitled to the exclusive possession of the homestead as against the widow's vendee.

Appeal from Audrain Circuit Court.—HON. ELIJAH ROBINSON, Judge.

REVERSED.

S. M. Edwards for plaintiff in error.

(1) The homestead act vested this peculiar interest, immediately upon the death of the parent, in the minor children, as well as in the widow. Wag. Stat., p. 698 § 5. The mother and widow could not alienate the children's interest. It could not be seized even for the debts of those children. *Dunton v. Woodbury*, 24 Ia. 74; *Moore v. Duning*, 29 Ill. 130. The fact that some of the borrowed money went to pay taxes makes no difference, as the State had no greater rights than individuals. *State v. Pitts*, 51 Mo. 132. (2) The mere fact that the widow in this case took the fee, did not vest in her the power to sell plaintiffs' homestead interest. *Skouten v. Wood*, 57 Mo. 380. (3) This interest was not subject to any debts. *State ex rel. Meinzer v. Diving*, 66 Mo. 375. "The widow during life can give no better right to her vendee than to her heirs." *Roberts v. Ware*, 80 Mo. 363. Ejectment is the proper remedy. *Canole v. Hurt*, 78 Mo. 649.

Macfarlane & Trimble for defendant in error.

There is nothing in the homestead law of this State

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either prohibiting or limiting the power of alienation, or the effect of an abandonment by the husband and father. Wag. Stat., p. 698, § 3, 5, 7, 8. Such, also, are the adjudications of the courts of other states in which the power of alienation is not expressly limited by the statute creating the homestead. Thompson on Homesteads, §§ 453, 455, 456 and authorities cited. The exemptions of the homestead law are only intended to relieve the family from the misfortunes or indiscretions of its head. They do not protect from voluntary acts of sale or abandonment. The father is the head of the family, and in case of his death, the duties, obligations, rights and authority devolve upon the mother. If the father could alienate or abandon the homestead, the widow succeeded to all the rights. The head of the family is the agent of the family with full powers. The rights of the children are in such subordination to those of the parents that whatever concludes the latter will equally conclude the former. Thompson on Homesteads, §§ 42, 43, 276, 483, 721; *Shepherd v. Brewer*, 65 Ill. 383; *Darson v. Holt*, 44 Tex. 174; *Morrill v. Hopkins*, 36 Tex. 686; *Hand v. Winn*, 52 Miss. 788; *Keyes v. Hill*, 30 Vt. 759; *Bursow v. Fowler*, 65 Ill. 146; *Guiod v. Guiod*, 14 Cal. 506; *Foss v. Strachn*, 42 N. H. 40; *Tadlock v. Eccles*, 20 Tex. 782. The answer shows that the widow alienated and abandoned the homestead and took the plaintiffs, her minor children, with her. They are bound by her acts. In case of her death another question would arise. If the plaintiffs retained a right it could not be enforced by an action in ejectment. The statute gives to the children no right independent of the mother. It was the duty of the widow to furnish necessities, pay taxes, etc., and she could charge the homestead therefor. Whether a sale of the homestead rights of the children could be effected under such charge may be doubted, but it is clear that the rights of parties could not be adjusted in a suit in ejectment.

PHILIPS, C.—This is an action in ejectment to recover

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the possession of the northeast quarter of section 19, township 52, range 5, situated in Audrain county. Petition is in the usual form. The plaintiffs are minors, suing by their next friend. The answer alleged that the land belonged in fee to one Joseph Kochling, that he died in 1871 seized of this land as a homestead leaving his wife and children surviving, the plaintiffs herein being his minor children. The widow and said children occupied said land as a homestead. She becoming indebted for taxes on said land and otherwise mortgaged the same to raise money. Under this mortgage the land was sold and the defendant claims title thereto under the purchaser at said foreclosure sale. That thereafter the said widow removed from the land with her minor children surrendering the possession to defendant. To this answer the plaintiffs demurred on the ground that the facts pleaded constituted no defense to the plaintiffs' action. The court overruled the demurrer. Plaintiffs declining to plead further, the court entered up judgment for defendant on said answer. From that judgment plaintiffs prosecute this writ of error.

The principles of law involved in this case have been fully considered and determined by this court in the cases of *Canole v. Hurt*, 78 Mo. 649, and *Roberts v. Ware*, 80 Mo. 363. Adhering to those decisions, the circuit court erred in overruling the demurrer to the answer and rendering judgment thereon for defendant. The answer constituted no defense to the action, and judgment should be rendered thereon for the plaintiffs.

The judgment of the circuit court is accordingly reversed and the cause remanded to be proceeded with conformably to this opinion. All concur.

The State to the use of Koch v. Roeper.

THE STATE *to the use of* KOCH v. ROEPER *et al.*, Appellants.

1. **Executors and Guardians:** ANNUAL SETTLEMENTS: EVIDENCE. Annual settlements of guardians and executors do not constitute *prima facie* evidence in their behalf.
2. **Guardian:** BOND, ACTION ON BEFORE FINAL SETTLEMENT. A ward who has attained his majority, may sue on his guardian's bond before the latter has made final settlement in the probate court.
3. **Trustees' Investments:** MAL-ADMINISTRATION. Where a trustee makes an investment in his private capacity, and fails to indicate promptly that his investment is on account of the estate he has in charge, he, thereby, subjects himself to well grounded suspicion of mal-administration upon claiming it to have been on account of the estate, after loss or depreciation of the security taken by him.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. T. & J. H. Farish for appellants.

(1) The exclusion by the referee of the annual settlements made by the guardian was erroneous. While such settlements stand they are *prima facie*, and as such entitled to be introduced in evidence. (2) Under the facts and circumstances of this case, until the guardian's final settlement was passed upon by the probate court there was no breach of the bond sued upon. (3) The finding of the referee "that all of the investments made by defendant, Roeper, of the money of the relator was contrary to law and wrongfully made," is against the undisputed testimony in the cause.

Finkelburg & Rassieur for respondent.

The report of a referee is equivalent to a special verdict. Such report is conclusive as to questions of fact, if there be any evidence to support them, and even where the record does not show all the evidence, the presumption is in favor of the finding. *West. Boat. Sav., etc., v. Kribben*, 43

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Mo. 37; *Woodrow v. Younger*, 61 Mo. 395; *Franz v. Dietreich*, 49 Mo. 95; *Johnson v. Long*, 72 Mo. 210; *Wiggins Ferry Co. v. Railroad Co.*, 73 Mo. 391. The referee did not err in excluding the annual settlements of the guardian, and not giving them weight as *prima facie* evidence. *Picot v. Biddle*, 35 Mo. 29; *Sheets v. Kirtly*, 62 Mo. 417; *In re Davis*, 62 Mo. 453. The relator was not precluded from bringing his suit on the bond until the guardian made final settlement. *State v. Rosswaag*, 3 Mo. App. 11; *Flach v. Fassen*, 3 Mo. App. 561.

MARTIN, C.—This was an action against the principal and sureties and of a guardian's bond brought by the ward after he had reached his majority. It is alleged in the petition that Bernard Roeper, as guardian of plaintiff, had received the sum of \$10,904.43 in cash, and \$1,031 in notes, on which notes he had collected \$31.75; that said sums with interest became payable to the relator in October, 1877, when he arrived at his majority, but had not been paid. The guardian and one surety filed a joint answer, admitting the receipt of the money and notes, and setting up payments to and on account of the ward. The executrix of the other surety filed a general denial.

The cause was referred to a referee. After all the evidence had been heard and the case closed, the defendants, Roeper and Deuper, by leave of court, filed an amended answer, denying the receipt of the money and notes and all other allegations in the petition, and setting up as a defense in reduction of damages the aggregate credits taken by the guardian in his annual settlements, and also in the aggregate, all the investments of moneys by the guardian, alleged to have been approved by the probate court. The answer, also, included the statement that the guardian had filed a final settlement in the probate court, which had not been heard or passed upon.

These matters were put in issue by a replication.

The referee found that the guardian had received the

money and notes as set forth in plaintiff's petition, and allowed him certain credits. He, also, found that the investments claimed to have been made by the guardian were unlawful, and that certain parts of the moneys were, during a part of the time, used by the guardian because he could not invest the same, on which sums the referee charged him interest at the rate of six per cent per annum, with annual rests; that the balance of the money was wrongfully used by the guardian and could have been loaned out; and on said balance the referee charged the guardian interest at the rate of ten per cent per annum with annual rests. The balance found against the guardian amounted to \$15,600.95.

To this report the defendants filed ten exceptions. The exception in which the defendants objected to the charge of interest at the rate of ten per cent with annual rests was sustained by the court, and in pursuance of such action the indebtedness of the guardian was reduced to \$12,921.08 upon which judgment was entered. The plaintiff acquiesced in this ruling, so that the action of the court in respect to compounding interest does not come before us. The remaining exceptions were overruled, and need not be noticed except in so far as they have been brought to our attention, in the argument upon which defendants rely for a reversal.

The first point urged by defendants relates to the action of the referee in excluding the annual settlements of the guardian. These settlements were offered by the guardian and his co-defendants in their own behalf, under the pleadings as they stood before amendment. The learned counsel for defendants maintain in their brief that such settlements are *prima facie* evidence in their nature and should have been admitted for that reason. Whether a paper is or is not *prima facie* evidence depends upon the nature of it, and upon the parties asserting it, or against whom it is asserted in the trial. I apprehend that no court would be justified in holding that annual settlements

should be accepted at all times and under all circumstances as *prima facie* evidence. And I think it would be equally impossible to justly declare that they could not be *prima facie* evidence under any circumstances. These conclusions become apparent when we consider the purpose which an annual settlement is intended to subserve, and the matters which it usually contains.

In the case of *Picot v. Biddle*, 35 Mo. 29, Hon. R. M. Field, who had been a legislator, and who was, in his day, one of the ablest lawyers at the Missouri bar says: "The real purposes of these annual accountings, in the contemplation of the legislature, were these: 1. To keep the probate court advised at short intervals of the proceedings of its subordinate officer, the executor. 2. To communicate in like manner, to all interested, information of the situation of the estate and the progress of the administration. 3. To serve as secondary evidence to the executor in the event of the loss of vouchers or the death of witnesses." In the case of *Picot v. Biddle*, which was decided after an exhaustive and able review of the whole law in this country, the only point involved was whether such settlements were conclusive. Whether they could be treated as *prima facie* evidence was not passed upon, the exigencies of the case not requiring it. My attention has not been called to any case in this State in which the point here presented is decided, although it may be, that in passing upon the question of the conclusiveness of such settlements the courts have ventured remarks which seem to concede them the effect of *prima facie* evidence.

In the case of *State to use of Thornton v. Hoster*, 61 Mo. 544, the point was not considered, nor decided except by a somewhat labored inference. According to the report of that case the plaintiff did not sue the guardian for an indebtedness and seek to prove it by his settlements. The plaintiff alleged that the guardian had made what he called a final settlement, in which he acknowledged an indebtedness to his ward in a certain amount which he refused

to pay. The court held that it was not a final settlement, notwithstanding its designation as such, and that the plaintiff could not recover on it as such. In this view of it the paper was excluded. If the court intended to decide that it was not admissible as *prima facie* evidence, when offered against the guardian and his securities by the ward, it certainly did not say so. Neither do I think it would be supported by the authorities of this State in such a declaration. *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29; *Blair v. Perpetual Ins. Co.* 10 Mo. 350; *Union Sav. Ass. v. Edwards*, 47 Mo. 445; *Western Boatmen's Ben. Ass. v. Kribben*, 48 Mo. 37.

Let us consider the point on principle. When the ward or executor is notified to come into court at the final settlement, he is at liberty then to contest any previous settlement. When the settlements are long or numerous, the probate judge, in the exercise of his authority to ascertain and define the issues to be tried, may well require the contestant to indicate by objections or exceptions the items which he intends to dispute. The balance of an account has no meaning independent of the component parts of the account, which are designated as the debit and credit sides of it. If the item contains a payment and is on the credit side of the account, on what principle can it be maintained that the settlement should be *prima facie* evidence of the truth of the issue in favor of the guardian. The paper is a creation of his own. It is nothing more than his own admission or statement under signature and oath. Such *ex parte* statements are not in the nature of *prima facie* evidence in favor of the party making them. The fact that the court has passed it upon an *ex parte* presentation adds nothing to its value. Such approval is only conditional and leaves it still subject to approval at final settlement. The order of approval is nothing more than an interlocutory order in the general proceeding *in rem*, subject to reversal and review at final hearing. It is nothing more than an interlocutory order in a pending and unfinished

proceeding. To hold that such settlements should constitute *prima facie* evidence in favor of the guardian is to ignore the principle excluding secondary evidence, and to force the ward to prove the negative of an issue to be tried. Why should the ward prove that the contested payment, was not made before any testimony of payment is submitted which he could cross-examine and show to be without merit. In respect to the charges on the debit side of the account the burden of proof is shifted. If the ward excepts to them, his exceptions to be of any advantage to him must be in the nature of a statement that the guardian was possessed of assets with which he has not charged himself. It is of no advantage to the guardian to declare that the debit side of his account should be taken to be correct, or that it implies *prima facie* that he had no more assets than charged against him. He is entitled to that implication any way, from the very nature of the issue raised by the exception. If the ward charges him with having received more assets he must prove it. The burden is on him like the burden of every other affirmative fact made by a pleader. I am, therefore constrained to say that I do not perceive any well grounded reasons for holding that these annual settlements should constitute *prima facie* evidence in favor of a guardian or executor. So far as the debit side of his account is concerned, such a holding would do him no good, because the exceptor accepts all which therein appears and wants more. But he cannot have more, without proving it, and the burden is on him to do this. In respect to the credit side of the account, the doctrine would elevate to the first rank what is only secondary evidence in its nature, and sanction the injustice of forcing the exceptor to prove a negative.

But when these annual settlements are offered by the ward, or heir, or other person, interested in the estate, as *prima facie* evidence only of the facts therein contained, I perceive no good reason for excluding them, any more than

other admissions or statements made by an accounting party in the discharge of his duty.

The settlements in this case were not offered as evidence against the guardian, but by the defendants as evidence in his favor and they were in my opinion properly excluded. It is true the question did not arise in the probate court; but the issue relating to the accounts was eliminated in a way substantially resulting like formal exceptions. When the settlements were presented, the plaintiff, either then or before that time, submitted to the referee a written list designating all the credits he accepted as correct, most of which were presumably in the settlements. All the other credits were impliedly ignored and denied; and as the burden was on the guardian to prove them, he knew precisely what he had to do, and the evidence shows that he did not suffer from the exclusion of evidence. His written declarations of credits were excluded, but he was present at the trial as a witness and in his own person furnished evidence of a higher order than such declarations.

It is next urged by defendants that the ward, although having attained his majority, could not sue on the bond of his guardian until a final settlement had been effected in the probate court. The law has been held otherwise in several well considered cases by the court of appeals. *State v. Rosswaag*, 3 Mo. App. 11; *Flach v. Fassen*, 3 Mo. App. 561. As the guardian in this case was insolvent and had delayed his final settlement beyond the proper time for it, I see no good reason in denying to the ward his right to resort to the bond for the purpose of obtaining his estate.

Thirdly, and lastly, it is urged that referee's finding of facts in relation to the investment of funds, to the effect that they were all contrary to law, is erroneous as not being supported by the testimony. The loan to Thomas Bellew of \$500 is claimed as sufficient to disapprove the finding. That loan was made in the name of the guardian in his individual capacity, and there is nothing in it to indicate that it was intended for the estate. It was on a one-

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fifth interest in certain real estate of doubtful value, and was not reported to the court till three years afterwards. It never was approved by the court. When a trustee makes an investment in his private capacity and fails to indicate promptly that his investment is on account of the estate he has in charge, he thereby subjects himself to well grounded suspicions of mal-administration, upon coming and claiming it to have been on account of the estate after loss or depreciation of the security taken by him.

The appeal in this cause is without merit and the judgment is affirmed.

All concur, except NORTON and SHERWOOD, JJ., absent.

CRUTSINGER V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

Appeal: JUSTICE: RAILROAD. A railroad which runs through a county and has been sued therein by service of process on its local agent, is a resident of such county within the meaning of Revised Statutes, section 3041, relating to appeals from justices of the peace, and must prosecute such appeals within the time limited to other residents of the county.

Appeal from Osage Circuit Court. — HON. A. J. SEAY,
Judge.

AFFIRMED.

Smith & Krauthoff for appellant.

Unless the defendant corporation is a non-resident of Osage county the appeal was not made in time, for more than ten days had elapsed after the refusal of the justice to set aside the default. R. S., § 3041. The place of residence of a corporation is deemed to be the place where its principal office is located, or where its principal operations

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are carried on. *Thorn v. Railroad Co.*, 2 Dutch. 121; *Conroe v. Ins. Co.*, 10 How. Pr. 403; *Jenkins v. Cal. Stage Co.*, 22 Cal. 537; *Sangamon Co. R. R. Co. v. Morgan Co.*, 14 Ill. 166; *Glazie v. Railroad Co.*, 1 Strob. 70; *Allen v. Pacific Ins. Co.*, 21 Pick. 257, In opposition to this view we are confronted with the case of *Slavens v. South Pacific R. R. Co.*, 51 Mo. 308, and this case we ask the court to review. Corporations in law are regarded as persons, and are treated for many purposes as citizens and inhabitants. *Railroad Co. v. Harris*, 12 Wall. 65, 81; *Railroad Co. v. Whitton*, 13 Wall. 270, 285; *People v. Utica Ins. Co.*, 15 Johns. 358, 382; *Ontario Bank v. Bunnell*, 10 Wend. 186. Corporations must be deemed to be persons in order to secure an equal distribution of the burdens of government. The same necessity demands that they should have a residence, and that their place of business should be deemed their residence. If so deemed then their rights, privileges, duties and obligations will closely approximate to those of natural persons and many of the perplexities in the administration of justice will be obviated. The construction of the statute in *Slavens v. Railroad Co.*, 51 Mo. 308, is an unreasonable and an unjust one and the defendant has been greatly injured and prejudiced thereby.

Edwin Silver and *H. Marquand* for respondent.

The question presented in this case was decided favorably to respondent in *Slavens v. Railroad Co.* 51 Mo. 308, and on the correctness of that decision respondent confidently relies—sees no reason for overruling it. Appellant cites no opposing authority in this State. The cases from other states cited by it were so decided in the absence of statutory provisions, such as are in force here, authorizing suits against corporations to be commenced in any county where such corporations have or usually keep an office or agent for the transaction of their usual or customary business. R. S., § 750. The effect of the statute is to make

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the defendant corporation having such office in the county a resident thereof for all the purposes of the suit. See, also, *Mikel v. Railroad Co.*, 54 Mo. 145.

PHILIPS, C.—This is an action begun against the defendant, a railroad corporation, in a justice's court in Osage county, for the recovery of damages for injury done to plaintiff's cow. Service of summons was made on a local station agent of defendant in said county. There was judgment in the justice's court for plaintiff. The defendant took an appeal to the circuit court, but after the expiration of the ten days next following the rendition of the judgment. In the circuit court this appeal was, on motion of plaintiff, dismissed because the same was not taken within the time prescribed by statute. From this action of the court defendant prosecutes this appeal.

The only question presented on this record for determination is, whether the defendant had twenty days within which to perfect his appeal from the justice's court, for it is conceded the appeal was not taken within ten days. If the defendant can be regarded as a non-resident of Osage county for the purpose of this action it would, under the statute, be entitled to twenty days to make its appeal. It is likewise, conceded that this identical question has been decided adversely to the construction contended for by defendant in *Slavens v. Railroad Co.*, 51 Mo. 308. We are asked to review that decision. We can discover no sufficient grounds for departing from the construction given therein to the statute. It is manifestly in accord with the language of the statute, and, we think, is expressive of the legislative intent. This case was followed in *Harding v. C. & A. R. R. Co.*, 80 Mo. 659.

The argument made by appellant against this law is one, *ab inconvenienti*, and could well be addressed to the legislative branch of the State government. Our functions should stop with construing and applying the law as we find it, if it be not void.

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The judgment of the circuit court is affirmed. All concur except NORTON AND SHERWOOD, JJ., absent.

THE STATE v. BARHAM, *Appellant*.

- 1 **Practice, Criminal: IMPROPER REMARKS OF COUNSEL: CONTINUANCE.** Where counsel for the State has procured the refusal of defendant's application for a continuance, in a criminal case, on account of the absence of material witnesses, by admitting that the statements contained in the affidavit in support of the same should be read as the testimony of such absent witnesses, his assertion before the jury in his closing argument that it was not their evidence, that they had never seen the statements, and would not have sworn to them if they had been present, constitutes such a departure from legitimate argument and fair dealing, as to justify a reversal of the judgment.
- 2 ———: **EVIDENCE.** To rebut the presumption of guilt arising from flight, a defendant in a criminal case has the right to show that his life was threatened by the relatives of the deceased, and in such case it is error to refuse to allow him to show the desperate and dangerous character of the persons making the threats.
3. ———: **ACT OR DECLARATION OF CO-DEFENDANT.** No act or declaration of one co-defendant, after the common enterprise is ended, can be given in evidence against his co-conspirator being separately tried.
4. ———: **DUTY OF COURT TO INSTRUCT JURY.** It is the duty of the court to instruct the jury as to all the grades of homicide to which the facts in evidence will apply.

Appeal from Dunklin Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

S. M. Chapman for appellant.

(1) The testimony of the witness Crawford that Nash left the country as soon as the shooting was over, and that he did not see him about after that, was improper and

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wrong. No act or declaration of one co-defendant, after the common enterprise is ended, can be given in evidence against his alleged co-conspirators. Wharton's Crim. Ev., § 699; *People v. Stanley*, 47 Cal. 112; *State v. Duncan*, 64 Mo. 262. (2) The defense should have been permitted to prove by the witness Crawford and others the desperate and dangerous character of the persons by whom defendant had been threatened, after the homicide. (3) The court should have instructed the jury upon the lower grades of homicide, especially murder in the second degree, and for this purpose all the testimony, including defendant's, should have been considered. *State v. Banks*, 73 Mo. 592; *Crawford v. State*, 12 Ga. 142; *State v. Bryant*, 55 Mo. 79. This should have been done whether asked by defendant or not. *State v. Mathews*, 20 Mo. 57; *State v. Jones*, 61 Mo. 236; *State v. Banks*, 73 Mo. 592; 2 Bishop Crim. Proc., (3 Ed.) § 638a; *State v. Branstetter*, 65 Mo. 155. (4) It was a violation of all legal fairness and good faith upon the part of the prosecution, after having admitted that the persons named in the application to continue, would, if present, testify as therein alleged, and that the same should upon the trial, be "read and admitted as and for their evidence," to tell the jury that it was not the testimony of sworn witnesses, but a statement "artfully prepared by counsel for defendant; that it was all a tissue of lies; that it contained nothing but lies, except a few immaterial things; that the persons named had never seen that statement, and would not have so sworn if they had been present." *State v. Underwood*, 75 Mo. 234; *State v. Roark*, 23 Kas. 151; *State v. Hickman*, 75 Mo. 421

D. H. McIntyre, Attorney General, for the State.

Counsel for the State, in his closing argument, had the right to indulge in severe invective against defendant, and to comment upon the evidence, including the affidavit for continuance, which was evidence like the rest. And it was

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not error for counsel to draw inferences in his argument unfavorable to defendant, because of his failure to testify fully upon the whole case. *State v. Emory*, 79 Mo. 461. Smith was indicted as principal in the first degree, and the defendant as principal in the second degree. But for all the purposes of the trial, they may be regarded as being jointly indicted as principals in the first degree, for the statute has abolished all distinction between the two degrees. R. S. 1879, § 1649; *State v. Ross*, 29 Mo. 32; *State v. Davis*, 29 Mo. 391; *State v. Talbott*, 73 Mo. 347; 1 Bishop Crim. Law, (7 Ed.) § 648, and authorities cited. It was competent to prove what part each performed in the act of killing, and that too without first establishing a conspiracy by them to kill the deceased. It was not necessary to prove a conspiracy at all. It was sufficient to show that they united in the act of killing, and this could be proved by their acts at the time and the weapons they used. *State v. Underwood*, 57 Mo. 40. The agreement to the commission of an offense may be inferred from acts as well as declarations. *Taylor v. State*, 9 Tex. App. 100. Even if it were necessary that there should be proof of an unlawful combination to kill the deceased, it is not necessary that it should be direct and positive. Defendant's connection with the transaction being shown, the jury may determine from the circumstances whether there was a combination. 4 Criminal Law Magazine, p. 102. Where the acts of the principal in the first degree are connected with defendant, on trial as principal in the second degree, they may be made to appear in the ordinary way. 2 Bishop Crim. Proc. (3 Ed.) § 14. In this case the acts of all the parties were so closely connected that they could not be separated, and what was done by Smith and Nash was admissible as *res gestae*. The instructions given covered the whole case, and the evidence did not warrant the giving of instructions upon any grade of homicide besides murder in the first degree.

NORTON, J.—The defendant and Willie Nash were

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jointly indicted as accessories with Daniel A. Smith as principal at the adjourned February term, 1881, of the circuit court of Dunklin county for murder in the first degree in killing one John C. Crawford. Defendant, Barham, was separately tried at the November term, 1883, of said court, and was convicted of murder in the first degree. Defendant having made an unsuccessful motion for a new trial, brings his case to this court by appeal, and assigns, among other things, the action of the court in admitting improper and rejecting proper evidence, in not instructing the jury as to some grade of homicide less than murder in the first degree, and in refusing to grant a new trial on account of improper conduct on the part of counsel for the state in the closing argument to the jury. The last of these objections will be noticed first.

When the cause was called for trial defendant made an application for continuance on the ground of the absence of certain witnesses named therein, who had been duly subpoenaed, and set out in the application the facts he expected to prove by said witnesses. Upon an admission by the prosecuting attorney that the persons named in the application would, if present, testify as was alleged in the application, and that the statement therein set forth should be read on the trial as and for their evidence, the continuance was refused as provided in section 1886, Revised Statutes, which declares that if upon application to continue, the adverse party "will consent that on the trial the facts set out in the application, or affidavit as the facts which the party asking the continuance expects to prove by the absent witness shall be taken as, and for, the testimony of such witness, the trial shall not be postponed for that cause; but the facts thus set out shall be read on the trial and shall be taken and received by the court or jury trying the cause as the testimony of the absent witness." The trial then proceeded, and the statement contained in the affidavit was read in evidence, and the counsel for the State, in the closing argument before the jury in commenting on the state-

ment, was allowed to state and represent to the jury that the statement "was not the testimony of sworn witnesses," but a statement "artfully prepared by counsel for defendant; that it was all a tissue of lies; that it contained nothing but lies except a few immaterial things; that the persons named had never seen it, and would not have so sworn if they had been present," but "the State had proven her case by living witnesses who had flesh and bone and blood, and had proven this statement to be lies and nothing but lies."

While we are disinclined to hamper prosecuting attorneys in the line of argument to be pursued by them in prosecuting persons charged with crime, and while we will not reverse a judgment for every unguarded expression made in the heat of discussion, provoked sometimes by the course of opposing counsel, and sometimes by the enormity of the crime developed by the evidence, yet in a case like the present, where the remarks made are "violative of all legal good faith and fairness," we feel it to be our duty to interfere. Had the prosecuting attorney treated the statement as legitimate evidence in the cause, and undertaken simply to demonstrate that it conflicted with the evidence on the part of the State, and that the evidence of the State's witnesses disproved the statement and showed it to be utterly false, there would have been no ground for disturbing the verdict on that account; but having procured the refusal of defendant's application for a continuance by admitting that the statement contained in the affidavit should be read as the evidence of the absent witnesses, thereby preventing defendant from procuring the personal attendance of such witnesses, and forcing a trial, his denial before the jury in his closing speech that it was their evidence that they had never seen the statement and would not have sworn to it if they had been present, was such a departure from legitimate argument and fair dealing as to justify a reversal of the judgment, especially so in view of what was said by this court, speaking through Judge

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SHERWOOD, in the case of the *State v. Underwood*, 75 Mo. 234, in which it was shown that the statute expressly says that the facts thus set out shall be read on trial, and shall be received by the court trying the cause as the testimony of the absent witnesses. "There can be no other rational construction placed on this language, but that it was intended to place the statement of facts set forth in the application for a continuance, on precisely the same footing to all intents and purposes as though the absent witnesses had been personally present and testified. And it was because we took this view of the matter on former occasions that we upheld the validity of the statute."

The case of the *State v. Jennings*, 81 Mo. 185, is to the same effect.

While under the principle announced in the case of *State v. Emory*, 79 Mo. 461, an indulgence by a prosecuting attorney in just and even fierce invective against a criminal, and in argument to show that the evidence on the part of a defendant was false, would afford no reason for reversing a judgment. Yet, in a case like the present, when the defendant was prevented from having his witnesses personally present to testify in court, by the admission of counsel that the facts stated in an application for continuance should be received as their evidence, and a denial made in the trial thus forced upon the defendant, before the jury in his closing speech, without rebuke from the court, that such was their evidence, a different case is presented. In the case of *State v. Roark*, 23 Kas. 147, quoted in the case of *State v. Hickman*, 75 Mo. 420, when the prosecutor indulged in a line of argument similar to that pursued in this case it was held that it could not be sustained.

During the progress of the trial the State offered evidence tending to show that a few days after the homicide defendant fled. To rebut the presumption arising from flight defendant offered evidence to show that the brothers and relatives of the deceased had threatened to kill him, but the court refused to allow him to offer evidence as to

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the dangerous and desperate character of the persons making the threats, and in doing this we think committed error.

The court also committed error in allowing the witness, Crawford, to state that Nash, who was jointly indicted with defendant, "left the country as soon as the shooting was over and that he did not see him after that." No act or declaration of one co-defendant, after the common enterprise is ended, can be given in evidence against his co-conspirator being separately tried. *State v. Duncan*, 64 Mo. 262, 266; *People v. Stanley*, 47 Cal. 114.

As the judgment will be reversed for the errors pointed out, it may be well to observe that there was evidence tending to show that the shots fired by the accused were accidental; and if such a state of facts should appear in a retrial of the cause under the rule laid down in the cases of *State v. Matthews*, 20 Mo. 57, and *State v. Banks*, 73 Mo. 592, it would be the duty of the court to instruct as to all the grades of homicide to which the facts in evidence would apply.

Judgment reversed and cause remanded. All concur.

NICHOLSON V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

Railroads: DOUBLE DAMAGES; STATEMENT. A statement in an action brought against a railroad before a justice of the peace for double damages for killing stock, is, after verdict, sufficient in that regard, if it avers that the stock strayed upon the railroad track of the defendant at a point * * * where said track was not inclosed by a good and sufficient fence, as the law directs.

Appeal from Clay Circuit Court.—HON. G. W. DUNN, Judge.

AFFIRMED.

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George. W. Easley for appellant.

The statement did not show that the land was of the character required to be fenced by Revised Statutes 1879, section 809; nor that the animal was killed in consequence of the want of a fence, therefore the defendant's instruction should have been given, and the motions for a new trial and in arrest of judgment sustained. *Hudgens v. Railroad Co.*, 79 Mo. 418; *Cunningham v. Railroad Co.*, 70 Mo. 202, and cases cited.

W. J. Courtney and Simrall & Sandusky for respondent.

PHILIPS, C.—This action was begun before a justice of the peace in Clay county, based on the following statement:

Plaintiff states that the Hannibal & St. Joseph Railroad Company is a corporation, made so by the laws of the State of Missouri, and is, therefore, liable to sue and be sued in the courts of said State of Missouri. Plaintiff further says that defendant owns and operates a railroad running through Kearney township, Clay county, Mo. Plaintiff also, says, that he was the owner of a brood sow of the value of \$20, and that said brood sow strayed upon the railroad track of defendant at a point in Kearney township, Clay county, Missouri, where said railroad track was not inclosed by a good and sufficient fence, as the law directs; said brood sow of the above value was run over and killed by the locomotive and cars, on or about the 28th day of May, 1881, the said locomotive and cars being operated by the employes of defendants.

Plaintiff therefore asks a judgment for damages for double the amount of the value of said brood sow, said amount being \$40 and his cost.

Plaintiff recovered judgment in the justice's court, from which the defendant appealed to the circuit court. On trial in the circuit court the evidence was as follows:

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James Thompson being introduced on the part of the plaintiff testified as follows :

I knew the brood sow sued for in this cause. She was the property of the plaintiff and was reasonably worth the sum of \$20. She was killed by defendant's train on the 28th day of May, 1881, at a point on its track in Kearney township, in Clay county, Missouri. At the point where she was killed and where she got upon defendant's track, the fence was down, and had been for some time. She was killed not on the crossing of a public or other highway, but where the road passed through enclosed pastures. The railroad had been fenced, but at the time of the killing and a long time before the fence at this point had been down, and the hog got on the track of defendant where said fence was down. I saw the hog killed as above stated.

Two other witnesses, introduced by plaintiff, testified to the same effect. This was all the evidence introduced by the plaintiff.

At the conclusion of the evidence the defendant asked the following instruction : " Under the statement and evidence the plaintiff is not entitled to recover." Which instruction the court refused, and found the issues for plaintiff and rendered judgment accordingly for double the value of the sow. From this judgment the defendant prosecutes this appeal.

The error relied upon by appellant for reversal of this judgment is the insufficiency of the statement. It is urged against this statement, that it does not allege that the land, through which the road ran, and where the injury occurred, was of the character required by the statute to be fenced ; nor that the animal was killed in consequence of the want of such fence. Under the recent decisions of this court this statement is sufficient after verdict. *Belcher v. Railroad Co.*, 75 Mo. 515 ; *Jackson v. Railroad Co.*, 80 Mo. 147, and authorities therein reviewed. The case of *Hudgens v. Railroad Co.*, 79 Mo. 418, relied on by appellant, does not sustain the objection made to this petition. It did not directly

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or inferentially appear from the statement in that case that the point at which the animal injured entered upon the railroad track was not fenced. Whereas the statement in question distinctly avers that the "brood sow strayed upon the railroad track of defendant at a point in Kearney township, Clay county, Missouri, where said railroad track was not inclosed by a good and sufficient fence, as the law directs." The averment that the land was not there fenced "as the law directs," is after verdict to be regarded as equivalent to the averment that the road at the given point ran through the character of land which the statute required to be fenced. *Jackson v. Railroad Co., supra.*

Finding no error in the record, the judgment or the circuit court is affirmed. All concur, except NORTON and SHERWOOD, JJ., absent.

ASHBY v. SHAW, *Appellant.*

1. **Partnership, what Essential to.** The relation of partnership does not exist between persons associated in a common undertaking, unless each one has the right to manage the whole business and to dispose of the entire property involved in the enterprise for its purposes, in the same manner and with the same power as all can when acting together.
2. **Counter-Claim: STATUTE.** Under Revised Statutes, section 3522, in an action arising on contract, any other cause of action arising on contract and existing at the commencement of the action, may be pleaded by way of counter-claim.
3. **Interest: TEN PER CENT, ERROR IN ALLOWING.** Where the petition does not allege that the contract sued on is in writing, or that it provided for the payment of ten per cent interest on the debt sued for, and the prayer of the petition not demanding interest, the court cannot allow ten per cent interest in its judgment.

Appeal from Clinton Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED

Smith & Krauthoff with *J. F. Harwood* for appellant.

The contract set out in the answer did not make the parties partners. *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 170; *Whitehill v. Shickle*, 43 Mo. 537. But even if the contract made them partners, yet the demand pleaded as a counter-claim is one that could be recovered in an action at law. *Byrd v. Fox*, 8 Mo. 574. One item unadjusted between partners, can be settled in an action at law. *Buckner v. Reis*, 34 Mo. 357; *Russell v. Grimes*, 46 Mo. 410; *Bethel v. Franklin*, 57 Mo. 466; 41. Pa. St. 102; 56 Pa. St. 183; 30 Mich. 304; *Dole v. Thomas*, 67 Ind. 570; Story on Part., (7 Ed.) 218. One partner can sue another on an express promise. *Crate v. Bininger*, 45 N. Y. 545; *Townsend v. Goewy*, 19 Wend. 424; *Venning v. Leckie*, 13 East 7. An equitable claim may be pleaded as a counter-claim. R. S., § 3522; *McAdow v. Ross*, 53 Mo. 199; *Hay v. Short*, 49 Mo. 139. A counter-claim secures to the defendant the full relief which a separate action at law or a bill in chancery, or a cross-action would have secured on the same facts. *Leavenworth v. Packer*, 52 Barb. 132; 37 How. Pr. 299. It may be of a legal or equitable nature. *Currie v. Cowles*, 6 Bosw. 453; *Siemon v. Schurck*, 29 N. Y. 598; Pomeroy on Remedies, §§ 742, 764. The judgment is erroneous on its face, as it bears ten per cent interest, when the petition does not ask for interest, and nothing appears authorizing more than the statutory rate of six per cent. R. S., § 2725; *Owenby v. Ely*, 58 Mo. 475.

S. H. Corn for respondent.

The demurrer to the third count of defendant's answer was properly sustained. The contract set out therein has all the elements of a partnership agreement. The parties agreed, as the pleading admits, that the interest of the parties in the results of the transaction could not be ascertained without an accounting. Such accounting cannot be

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had in this suit without a stay of the proceedings at law until such rights are ascertained by a proceeding in equity, and this is not permitted unless special grounds for the interference of a court of equity exists. *Field v. Oliver*, 43 Mo. 202; *Reppy v. Reppy*, 46 Mo. 572; *Pool v. Delaney*, 11 Mo. 570; 2 Story's Eq., § 1436. See also *Scott v. Carruth*, 50 Mo. 120; *Leabo v. Renshaw*, 61 Mo. 292; *Wright v. Jacob*, 61 Mo. 19; *Jones v. Shaw*, 67 Mo. 667. The judgment will not be reversed because it is made to bear ten per cent interest. It nowhere appears in the record that this was error. It is nowhere shown that the contract was not in writing and did not bear ten per cent interest. It was not necessary to make affirmative allegations to that effect in the petition. *Gist v. Eubank*, 29 Mo. 248; *Gardner v. Armstrong*, 31 Mo. 535. In the absence of anything to the contrary in the record, it will be presumed that the contract was in writing and was for payment of ten per cent interest. *Good v. Crow*, 51 Mo. 212; *State v. Sullivan*, 51 Mo. 522; *State v. Rogers*, 36 Mo. 138; *Walter v. Catheart*, 18 Mo. 256. The court will not reverse but only correct the judgment for such error as to interest if it be one. *Page v. Arnold*, 51 Mo. 158; *Fine v. Public Schools*, 39 Mo. 68.

EWING, C.—Plaintiff sold defendant certain land for \$2,555, a part of which was paid, and this suit was instituted to recover the balance due amounting to \$220. The material part of the defendant's answer alleged that there was subsisting between plaintiff and defendant a written contract as follows:

“April 10, 1877.

Article of agreement by and between Wm. Shaw, of the first part, and J. L. Ashby, of the second part, all of Clinton county, Mo. Whereas, Wm. Shaw agrees to buy cattle at his own expense and furnish money for the same; also to furnish about 35 to 40 acres of land for one year, Ashby to furnish balance of pasture, same time, and pay to Shaw one hundred dollars. Any expense for feeding of

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corn or otherwise, to be allowed to Shaw out of profits, if any, and if not, to be made up by Ashby, and if any profits after above, to be equally divided. Ashby to only furnish the southeast quarter section nineteen, township 57, range 30.

WILLIAM SHAW, [SEAL.]
J. L. ASHBY. [SEAL.]”

That defendant performed and fulfilled said contract on his part. That under and in pursuance of said contract, defendant purchased and paid for between the date of said contract and — day June following, eighty-one steers at the aggregate sum of three thousand and thirty-four and fifty one-hundredth dollars (\$3,034.50.) That defendant under and in pursuance of said contract paid for feed and caring for said cattle from the time they were purchased until they were sold, on or about October, 1877, the further sum of five hundred and thirty-one and fifty one-hundredth dollars (\$531.50.) That in October, 1877, plaintiff and defendant agreed together that the defendant should take said cattle at the sum and price of three dollars and seventy-five cents per hundred, gross weight, and account to plaintiff for his interest under said contract. That in pursuance of said arrangement, said cattle were weighed and delivered to the defendant. That said cattle, when weighed and delivered to the defendant, amounted to the sum of three thousand two hundred and seventeen and fifty one-hundredth dollars, (\$3,217.50), leaving a loss of three hundred and forty-eight and seventy-five one-hundredth dollars, (\$348.75), which, under said contract in writing, plaintiff bound himself to make good to defendant. That plaintiff has neglected and refused to pay said sum to defendant, and that the same is still due and owing to him. That after allowing the plaintiff the sum of two hundred and twenty dollars, as prayed for in plaintiff's petition, there is yet due the defendant from the plaintiff the sum of one hundred and twenty-eight and seventy-five one-hundredth

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dollars, for which he prays judgment with interest at the lawful rate from October, 1877, and for all other proper relief."

To this answer the plaintiff demurred :

1. That said answer does not set forth facts sufficient to constitute a defense to the cause of action set forth in the petition.

2. That the matters set up and pleaded as a counter-claim constitute no offset or counter-claim or other defense to plaintiff's cause of action.

Which was sustained and judgment had for plaintiff.

I. The sufficiency of the answer must depend upon the construction of the contract set out in the answer. The plaintiff insists that it created a partnership as to the matters therein, and could not be pleaded as a set-off or counter-claim.

In *Musser v. Brink*, 68 Mo. 242, that clause of the contract under discussion was "and it is further agreed by and between said parties, that the party of the first part is to furnish money sufficient to purchase stock enough to eat up the said grain or produce raised on said farm. * * And it is agreed that when any sale of any of said stock is made, the said party of the first part is to first have the amount of the purchase money thereof, and then the balance is to be divided equally between said parties." The court, JUDGE SHERWOOD delivering the opinion, held that this contract did not constitute the parties partners.

In *Donnell v. Harshe*, 67 Mo. 170, this court reviewed at some length the subject of partnership, and the authorities bearing upon the question as to what constitutes a partnership; it was held that an agreement that the tenant should cultivate the farm of his landlord on shares, each paying half the expenses and sharing equally in the profits, did not constitute a partnership.

In *Dwinel v. Stone*, 80 Me. 384, it was held, that to constitute a partnership, each partner must have the right "to make contracts, incur liabilities, manage the whole

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business, and to dispose of the whole property of the partnership, for its purposes, in the same manner, and with the same power as all the partners could when acting together."

The case at bar is not materially different from *Donnell v. Harshe*, *supra*, nor *Musser v. Brink*, particularly the latter.

Could Ashby have sold the "whole property" for the purposes of the parties under the contract? The contract was that Shaw should "buy cattle at his own expense and furnish the money for the same;" but there is no provision that they should belong to the two and be disposed of on joint account. They were the property of Shaw; and Ashby possessed no right under the agreement to sell them. He had no right to "manage the whole business," and according to the rule announced in the cases referred to, the agreement under consideration did not make the parties partners. The demurrer therefore ought to have been overruled.

II. The second sub-division of Revised Statutes 1879, section 3522, referring to the counter-claim provided for in section 3521, reads as follows: "In an action arising on contract, any other cause of action arising, also, on contract, and existing at the commencement of the action." This needs no construction. It construes itself, and brings the counter-claim pleaded in this case clearly within the statute.

III. The petition does not allege that the contract sued on was in writing, nor does it allege that it provided for the payment of ten per cent interest on the deferred payments. The prayer of the petition does not demand interest, and yet the judgment is for the sum sued for with ten per cent interest. This was error. R. S. 1879, § 2725.

The judgment is reversed and the cause remanded. All concur, except NORTON and SHERWOOD, JJ., absent; HOUGH, C. J. concurs in the result.

THE STATE V. LONEY, *Appellant*.

Witness: CONVICT: STATUTE. Under the Revised Statutes of 1879, one under a sentence for robbery is a competent witness in behalf of a defendant jointly indicted with him.

Appeal from Carroll Circuit Court.—HON. J. M. DAVIS,
Judge.

REVERSED.

Hale & Sons and Shewalter & Sebree for appellant.

The circuit court erred in excluding Ott as a witness for defendant. *State v. Slaughter*, 70 Mo. 484; *State v. Booher*, 71 Mo. 631; *State v. Grant*, 79 Mo. 113; 1 Black. Com., p. 90. The preponderance of judicial authority has always been in favor of the competency of one co-defendant to testify for another. *State v. Allen*, 10 Ohio St. 287; 1 Bishop Crim. Proc., § 511; *State v. Roberts*, 15 Mo. 29. A convicted co-defendant, if not disabled for infamy, was always competent at common law. He had no further any such interest in the defense as would disqualify him. 1 Bishop Crim. Proc., § 511; *State v. Statts*, 26 Mo. 307; 1 Greenleaf Ev., §§ 362, 379. Defendant and Ott were not jointly prosecuted, hence Ott was a competent witness. 1 R. S., § 1917. The record does not show that defendant was in court to make his challenges to the grand jury empanelled at the December term of court, 1882, which found a true bill against him. R. S., § 1772; 1 Bishop Crim. Proc., § 745, note 1. The court erred in requiring defendant to consent to the separation of the jury in the presence of the jury. 1 Bishop Crim. Proc., § 827; *Terry v. Buffington*, 11 Ga. 337; *State v. Davis*, 66 Mo. 686; *State v. Melton*, 67 Mo. 594. The court erred in permitting Mr. Holliday to assist in the prosecution without his authority to do so appearing of record. 1 Bishop Crim. Proc., § 998. The first instruction given for the State is wrong. It requires

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the jury to find less than is necessary in order to convict of robbery in the first degree. *State v. Heed*, 57 Mo. 255; *State v. Mitchell*, 64 Mo. 192; *State v. Howerton*, 59 Mo. 91; *State v. Broderick*, 59 Mo. 320; R. S., § 1302. Instruction one, given for the State, and one for defendant, are inconsistent. *State v. Ball*, 27 Mo. 327; *State v. Phillips*, 24 Mo. 490.

D. H. McIntyre, Attorney General, for the State.

The indictment follows the language of the statute, (R. S., § 1302,) and is sufficient. *State v. Howerton*, 59 Mo. 91; Kelley's Crim. Law, §§ 575, 576. The court committed no error in excluding the testimony of Ott. R. S., § 1917; *State v. Martin*. 74 Mo. 547. Ott was undergoing a sentence for a felony, and was not a competent witness in any case, civil or criminal, either for the State or for the defendant. R. S., § 4031. The court gave every instruction asked by the defendant. Those given for the State are not specifically objected to. The first and second for the State, together with the sixth for the defendant, put the law of the case fully before the jury. If the robbery was committed either by force and violence, or by putting in fear of immediate injury to the person, it was robbery in the first degree. *State v. Broderick*, 59 Mo. 318. There is no merit in the point that Mr. Holliday was allowed to assist the prosecuting attorney without an order of record being first entered to that effect. *State v. Hayes*, 23 Mo. 287; *State v. Stark*, 72 Mo. 37.

MARTIN, C.—At the December term, 1882, of the circuit court of Carroll county, the defendant and one Jack Ott were indicted for a robbery charged to have been committed by them on the 10th of September, 1882. Jack Ott pleaded guilty and being found to be under the age of eighteen years, he was sentenced to imprisonment in the county jail for the term of one year. At a subsequent

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term, the trial of defendant came on. He offered as a witness in his behalf said Jack Ott, who was serving out his sentence of imprisonment in the county jail. On objection of the prosecuting attorney the witness was excluded as incompetent to testify by reason of his conviction and sentence. The trial resulted in a conviction and sentence of defendant to confinement in the penitentiary for the term of ten years. From this judgment he appeals.

The disqualification of convicts as witnesses was omitted in the revision of 1879. R. S. 1879, § 1378. This omission could not operate to revive the disqualification which the common law imposed upon persons made infamous by conviction. The effect of this change in our statutes was elaborately considered in the case of *State v. Grant*, 79 Mo. 113, wherein it was held that the amendment operated prospectively only. As the defendant was tried for committing a robbery long after the amendment went into effect, he was entitled to the evidence of the excluded witness, unless some other disqualification forbade him to testify. It is claimed by counsel for the State that the witness was disqualified on account of being jointly indicted with the defendant. Under the common law a co-defendant in an indictment was an incompetent witness irrespective of the character or grade of the offense charged. *State v. Roberts*, 15 Mo. 29; *State v. Martin*, 74 Mo. 547; R. S. 1879, § 1917. The effect of this rule was not escaped by a separate trial.

This disqualification could not arise from any supposed turpitude, for none such is attached to an indictment or accusation. It proceeded from the assumed interest the witness must possess in the trial of an issue to which he was a party of record. The common law assumed that such interest disabled him from giving truthful information bearing upon the issue, and furnished him with an inducement to commit perjury. While thus related to the issue he was disqualified from testifying, in both civil and criminal cases. When this disqualifying interest was removed,

he became admissible as a witness. It was held to be removed by an acquittal, and by a *nolle prosequi*. It is evident that it was as effectually removed by a conviction; for, nothing which he might testify to could help or prejudice him in his own trial, which was disposed of as an event of the past; and such I understand to be the import of the American authorities. Bishop Crim. Proc. A conviction operated as a qualification of a co-defendant as a witness in all cases in which the conviction itself did not add the further disqualification of infamy. It was so expressly held in *State v. Stotts*, 26 Mo. 307. And even in cases in which an accomplice was charged and convicted of an infamous crime, it was the practice to admit him as a competent witness at any time between the date of his conviction and the date of sentence or judgment, when the disqualification of infamy under the law attached to the judgment and not to the conviction alone. This practice is alluded to and reasoned from by Richardson, J., in the case last cited.

I am, therefore, satisfied that the disqualification of the witness in this case, which arose from his relation to the case as co-defendant before trial, was removed by his conviction, and that the disqualification of infamy, which, heretofore attached to a conviction, has been omitted in the revision of 1879, and no longer exists. The tendency of our legislation on the subject of evidence is in derogation of the common law. The spirit of modern jurisprudence is in keeping with that of modern science, and aims to receive light and information for all that it is worth, from whatever source it may come. In view of the conclusion we have reached it is unnecessary to consider the other grounds of reversal argued in the briefs.

For error in excluding the witness offered by defendant, the judgment is reversed and cause remanded. All concur.

THE STATE V. HUGHES, *Appellant*.

1. **Pleading, Criminal:** INDICTMENT: JEOfAILS. The defects of an indictment which fails to state the time and venue of an offense, are cured by the statute of jeofails after verdict. R. S. 1879, § 1821.
2. ———: PRACTICE, CRIMINAL: ALLEGATIONS: PROOF. In a criminal prosecution the time alleged in the indictment as the date of the commission of an offense, must be within the time prescribed for limiting the prosecution, and the proof must be of a day before the finding of the indictment and within the period prescribed for limitation.
3. **Practice, Criminal:** VENUE. Where the bill of exceptions fails to show that the offense was proved to have been committed in the county where the indictment was preferred, the judgment will be reversed.
4. **Criminal Law:** DISTURBING PEACE OF NEIGHBORHOOD. In a prosecution under Revised Statutes 1879, section 1527, for disturbing the peace of a neighborhood, to sustain a conviction, it must be shown that the peace of those residing in the vicinity of each other, and regarded as neighbors, was disturbed. It is not enough to show that the peace of those assembled at a park or other public place was disturbed.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

No brief for appellant.

D. H. McIntyre, Attorney General, for the State.

The omission to lay the venue of the offense in the indictment is cured by the statute of jeofails. It provides that "no indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected; * * for want of a proper or perfect venue; nor for want of any venue at all." R. S. 1879, § 1821. Nor does the failure to allege the time of the commission of the offense invalidate the indictment. Time was not of the essence of the offense.

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R. S. 1879, § 1821; *State v. Findley*, 77 Mo. 338, and cases cited. If the willful and unlawful acts of the defendant disturbed the peace of persons in a public place, where they had the right to be, the offense was committed. *State v. Lunn*, 49 Mo. 90.

PHILIPS, C.—On the 5th day of July, 1880, the defendant, with others, was indicted in the Buchanan circuit court for disturbing the peace of a neighborhood. The indictment is as follows: "The grand jurors of the state of Missouri, within and for the body of the county of Buchanan being duly empanelled and sworn, do present that Robert Hughes (naming the other indictees) did unlawfully and willfully disturb the peace of a neighborhood by loud and unusual noises, by quarreling and fighting, and by loud, indecent and offensive conversation contrary, etc." On trial had at the July term, 1881, the defendant was found guilty, and his punishment assessed by the jury at four months, imprisonment in the county jail. From the judgment entered thereon the defendant has appealed to this court.

I. This whole record, beginning with the indictment and ending with the trial, shows great carelessness and inattention on the part of the representatives of the state, both as to matters of form and substance in the proceedings. No venue or time is laid in the indictment. These defects are cured however by the statute of jeofails after verdict. R. S. 1879, § 1821; *State v. Findley*, 77 Mo. 338. But, the remarkable condition of the case is that the record discloses that the indictment was found and presented in court on the 5th day of July, 1880, the trial had on the 12th day of July, 1881; and it is impossible from the evidence preserved in the bill of exception to tell whether the offense, actually tried, occurred prior to the finding of the indictment. One witness testified to an affray occurring "sometime in July, 1880." The next witness to "the 18th day of July, 1881." If he meant 1880 it was thirteen days

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after the indictment was presented. The other witnesses testify that the disturbance occurred "in July," no day or year being given. There might not be reversible error in any of this, as the first witness fixed the time "sometime in July, 1880;" but when the state presented its instructions it asked the court to tell the jury, and the court did tell the jury that if they believed from the evidence that the defendant with others "did on or about the 24th day of July, 1880, or within one year prior to said time" commit the offense they should find him guilty. The time fixed was nineteen days subsequent to the presentment of the bill. The instruction did not only authorize the jury to find the defendant guilty, if they believed the offense was committed on the 24th day of July, 1880, but on any other day between the 5th day of July, 1880, the date of the indictment, and the 24th day of July of that year. It is not essential that the state should prove that the offense occurred on any particular day. It will be sufficient if it appear that it occurred at any time within the year preceding the date of the bill of indictment. But it must affirmatively appear that the offense was committed prior to the presentment. In *State v. Magrath et al.*, 19 Mo. 678, Ryland, J., expresses the law aptly thus: "It is not important, as to what day is alleged or what day is proved, so that the time in the indictment is within the period prescribed for limiting the prosecution, and the proof is of a day before the finding of the bill of indictment by the grand jury, and within the period prescribed for limitation."

II. There is no evidence in the bill of exceptions showing proof of venue. It does not appear that the offense occurred even in this state. For this, if nothing more, the judgment must be reversed. *State v. Burgess*, 75 Mo. 541; *State v. Babb*, 76 Mo. 501.

III. Under the evidence in this case, I am of opinion the defendant should have been acquitted of the offense for which he stood indicted. This indictment is based on section 1527, R. S. 1879, which is as follows: "If any person or

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persons shall willfully disturb the peace of any neighborhood or of any family or any person by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, quarrelling, challenging or fighting, every person so offending," etc. The charge against this defendant is for disturbing the peace of a neighborhood. It is worthy of note that this section distinguishes this offense from that of disturbing the peace of a family or of any person. The term neighborhood has a well understood meaning in common acceptation. Webster defines it: 1. The quality or condition of being a neighbor or of dwelling near. 2. A place near; vicinity; adjoining district; a region, the inhabitants of which may be counted as neighbors. 3. The inhabitants who live in the vicinity of each other. The evidence merely discloses that the place where this breach of the peace occurred was a park where beer seems to have been dispensed. There was an assemblage of people there. Nobody was disturbed, so far as the evidence disclosed, other than those thus assembled. There is not one word of evidence to indicate that anybody in "the neighborhood" was disturbed or that they even heard of the affray. The case was evidently tried on the theory that it was sufficient to sustain the charge to show that the people assembled at this park were disturbed. The disturbing of such assembly of people, if assembled for a lawful purpose, is an offense specially provided for in the succeeding section, 1528, of the statute, and, therefore, it cannot be punished under an indictment founded on the other section for disturbing a neighborhood. The strict construction placed upon this statute is indicated by the cases of *State v. Jones*, 53 Mo. 486 and *State v. Schieneman*, 64 Mo. 386.

The instruction asked by defendant, or its equivalent in direct and explicit terms, should have been given, declaring, in effect, that unless the peace of the neighborhood, or some portion of it, was disturbed distinct from the assembly of persons at the park the defendant should be acquitted.

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The judgment of the circuit court is reversed and the cause remanded. All concur.

HALFERTY V. THE WABASH, ST. LOUIS & PACIFIC RAILWAY
COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK: STATUTORY SIGNALS.** In order to render a railroad company liable for injury done to stock at public crossings by its engines and cars, it must be shown that its failure to ring the bell and sound the whistle concurred. Nothing short of an entire failure in both these particulars will cast liability upon the company.
2. ———: ———: **COLLISION, EVIDENCE OF.** Where there is no evidence of a collision between a railroad train and an animal alleged to have been killed by such train, there can be no recovery. But such collision need not be shown by direct testimony, but may be inferred from the facts and circumstances in evidence.
3. ———: **PUBLIC CROSSINGS: SIGNALS.** It is the duty of those who handle such dangerous machinery as a railroad train, to be on the lookout, as well as to give the statutory signals, when approaching public crossings.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN,
Judge

AFFIRMED.

Wells H. Blodgett and Geo. S. Grover for appellant.

There was no collision proved between the train and the animal. This, of itself, should have nonsuited plaintiff. *Lafferty v. Railroad Co.*, 44 Mo. 291; *Hughes v. Railroad Co.*, 66 Mo. 325; *Seibert v. Railroad Co.*, 72 Mo. 565. There was no evidence that the engineer could have stopped the train with safety after discovering the dangerous situation of the animal. If he could not, his failure to stop the train was a prudent and not a negligent act. *Pryor v. Railroad Co.*, 69 Mo. 218; *Bell v. Railroad Co.*, 72 Mo. 50. Nor was

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it shown that the failure to give the signals within eighty rods of the crossing caused the injury. Plaintiff was not, therefore, entitled to recover, and it was error to refuse defendant's instruction. *Holman v. Railroad Co.*, 62 Mo. 562; *Wallace v. Railroad Co.*, 74 Mo. 597; *Powell v. Railroad Co.*, 76 Mo. 83. The first instruction given for plaintiff was erroneous. Revised Statutes, section 806 does not require both the blowing of the whistle and the ringing of the bell. Either is sufficient. *Turner v. Railroad Co.*, 78 Mo. 578. The second instruction given for plaintiff is erroneous, as there is no evidence on which to base it. It is fatal error to assume the existence of facts not in evidence and found instructions upon them. *Washington, etc., Co. v. St. Mary's Seminary*, 52 Mo. 480; *Gerren v. Railroad Co.*, 60 Mo. 405; *Peck v. Ritchey*, 63 Mo. 114; Thompson on Charging the Jury, p. 75.

D. H. McIntyre and *F. M. Brown* for respondent.

The connection between defendant's default and the injury may be inferred from all the circumstances of the particular case. *Alexander v. Railroad Co.*, 76 Mo. 494. The evidence clearly made a case for the jury. The testimony was uncontradicted that the mule was strong and valuable, and in a situation and condition to get out of the way if the signals had been given. *Goodwin v. Railroad Co.*, 75 Mo. 76; *Alexander v. Railroad Co.*, 76 Mo. 494; *Turner v. Railroad Co.*, 78 Mo. 578. It was defendant's imperative duty to ring the bell and sound the whistle, and no excuse is receivable for its failure to do so. *Johnson v. Railroad Co.*, 77 Mo. 546. The first instruction given for the plaintiff is not open to the objection urged against it by appellant's counsel. It correctly declares the law. It tells the jury that it was defendant's duty to ring the bell or sound the whistle, and if they found from the evidence that it neglected to ring the bell and also neglected to sound the whistle, and further found that the mule was killed by

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reason of such negligence, they should find for the plaintiff. This was in harmony with late decisions of this court. *Van Note v. Railroad Co.*, 70 Mo. 541; *Turner v. Railroad Co.*, *supra*.

SHERWOOD, J.—Action before a justice of the peace. The material part of plaintiff's amended petition upon which the cause was tried in the circuit court is as follows:

* * * * *

And for cause of action states that on the 16th day of January, 1881, plaintiff's mare mule about four years old, dark colored and about sixteen hands high, and of the value of \$175 (with other stock of plaintiff's), attempted to cross the track of said railroad at a point on said railroad in said Atchison township, in said county, adjoining Concord township, in said county of Clinton, and where said road crossed a traveled public road for public use and at a point where the farms of Ellen E. Scott, S. H. Scearce and S. Halferty corner or join.

That plaintiff's said mule having attempted to cross defendant's said railroad track at said point at the time and place as aforesaid, was carelessly and negligently run over, struck and instantly killed by the locomotive and train of cars of the defendant, being then and there operated by defendant, its agents, servants and employes, and that the defendant, its agents, servants and employes, on said day and at the time plaintiff's said mule as aforesaid, attempted to cross defendant's said track at said place as aforesaid, carelessly and negligently failed to ring the bell placed on the locomotive of their said engine, and carelessly and negligently failed to ring the bell at a distance of eighty rods from the said crossing, and failed to keep said bell ringing until said train had crossed said crossing where they killed plaintiff's said mule, and carelessly and negligently failed to sound the steam whistle attached to their said engine eighty rods from the place where the said road crosses said traveled public road, and negligently failed to sound their

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steam whistle at intervals until they had crossed said public road at the time and place as aforesaid, and in violation and contrary to the provisions of the statutes in such cases made and provided, and negligently failed to check the speed of their said locomotive and train, but, on the contrary, willfully let on more steam and increased the speed of their said train when within a few feet of said public crossing, and while in full view of plaintiff's said mule while attempting to cross their said track.

Wherefore, he alleges he is damaged in the sum of \$175. Wherefore he prays judgment for the said sum of \$175, and for all other proper relief in the premises and costs of suit.

The entire evidence in the cause was as follows. The plaintiff testified:

"Am the plaintiff in the case and owner of the mule. On January 16th, 1881, I missed my mule; next morning found her at the railroad crossing on the public highway west of and adjoining my farm. She was dead, lying on the north side of the railroad in the public highway and near the east side.

There was a willow tree north of the track and on east line of the highway. The mule was north of this sapling; its back against it. There was snow on the ground and no tracks between where the mule lay and the railroad track. Had seven head of stock out; the old mare was leader of stock and mules. She was afraid of bell and whistle and when either is sounded she will run away as far as she can and as quickly as possible. The other stock were in the habit of following her. Mule was worth \$175. The railroad runs through a cut on a curve west of crossing; the back bone of the cut is about seventy yards west of crossing; it is a little down grade at the crossing. The person in charge of train could have seen stock crossing seventy or eighty yards away."

Examination by court: On left hind leg of mule was.

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a mark near hoof about the size of a half-dollar where skin was off; no other bruise or mark of injury or violence.

M. Conner testified he was about forty or fifty yards from the crossing when the train came up; was paying particular attention to the train as I had a pair of young mules and was afraid they would be frightened. They did not sound their whistle that I heard, but rung or tapped the bell three or four times about twenty-five yards from the crossing. The mule was lying about twenty feet from the track near a willow tree; no marks of injury or violence on the mule except a place about the size of a half-dollar on the left hind leg near the hoof the hair was off. The train was from ten to fourteen cars and was going east. Can see crossing about 130 or 140 yards west of crossing. The stock was south of crossing about twenty-five yards when I saw them and were going north toward the crossing. Mare was crossing the track when bell was sounded. She got away. No tracks between railroad track and where the mule lay; the animal near the foot where the hair was off was bleeding a little.

Wm. Lott testified: Saw mule after it was killed; saw train January 16th, 1881, about two hundred and fifty yards west of crossing; was watching train. It did not whistle; don't know whether bell was rung or not; I did not hear it. No bruises or wounds on mule except hair off on left hind leg near hoof.

Admitted that mule was worth \$175, and that the mare became frightened at sound of bell or whistle and was leader of the stock.

This was all the evidence offered by plaintiff.

Wm. Martin, on defendant's behalf, testified: Am locomotive engineer; am in employ of defendant; nine years' experience; was engineer on locomotive January 16, 1881, on Wabash, St. Louis & Pacific Railway, attached to a freight train going east; saw a lot of horses and mules south of crossing; they attempted to cross the track; all got across but one; it seemed to study what it would do and

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finally went across; it jumped and fell on its side on north side of the crossing; engine did not strike the mule nor did any part of the train strike it. We had been ringing the bell for more than eighty rods before we came to the crossing; the bell was rung by a brakeman; the whistle was sounded before we crossed the highway; if the engine or any part of the train had struck the mule it would have been thrown forward and in the direction the train was moving and would have left wounds or broken bones on the mule.

M. St. Clair testified: Was fireman on engine of defendant pulling freight train going east on January 16, 1881. Did not see the mule until it was across the track; engine did not strike the mule nor did any part of the train; he ran against a tree on the north side of the track and fell; the bell was rung and continued ringing for eighty rods up to and over the crossing; if the train or engine had struck the mule it would have thrown it forward and left wounds and bruises on its body.

Cross-examination: We whistle for stock; the mule was on its feet when I saw him between the track and the tree; was going between a trot and a gallop. Engine was on the crossing when I saw the mule; I know the bell was rung because it was our instructions so to do, as well as our custom at all crossings.

M. O'Conner testified: Am section foreman. Examined the mule; it had no bruises or wounds except a little hair near its left hind foot; turned him over and examined him carefully; he was lying in the public highway north of the crossing.

Joseph Allabaugh testified the same. This was all the evidence.

The court gave the following instructions at the request of plaintiff, and against the objections of defendant.

1. It was the duty of the servants and employes of defendant in charge of the locomotive and train, to cause the bell on the locomotive to be rung at a distance of at least eighty rods before reaching the crossing where the mule was

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killed, and to keep said bell ringing until the train had reached the crossing; or to cause the steam whistle to be sounded at least eighty rods from said crossing, and cause it to be sounded at intervals until the locomotive reached said crossing; and if the jury are satisfied by the evidence that defendant's servants or employees in charge of said locomotive and train did neglect to cause said bell to be rung as above stated; and also further neglected to cause said whistle to be sounded at least eighty rods before reaching said crossing; and did neglect to cause said whistle to be sounded at intervals until said train reached said crossing; and if the jury further find that the killing of plaintiff's mule was caused by such negligence, they should find for the plaintiff.

2. That if the jury believe from the evidence, that by the negligence or carelessness of the agents or employees of defendant in the operation of the locomotive engine and cars of the defendant, the plaintiff's mule was run against and killed, then they will find for the plaintiff.

3. That, if the jury find for plaintiff, they will assess his damages at the sum of \$175, the defendant admitting that to be the value of the mule.

To the giving of which instructions defendant excepted.

The court gave the following instructions at the request of defendant:

2. Before plaintiff can recover in this action, he must prove to the satisfaction of the jury that the injury complained of was caused by the negligence and carelessness of defendant's employees in charge of the train.

3. The court instructs the jury that unless they believe from the evidence that there was an actual collision between defendant's engine or cars and plaintiff's mule they must find for defendant.

4. The burden of proving the facts in the instructions numbered two and three is upon the plaintiff, and if he has failed to prove either of said facts to the satisfaction of the jury they must find for the defendant.

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The court refused the following instruction asked for by defendant:

The court instructs the jury that under the law and evidence in this case the plaintiff cannot recover.

To the action of the court in refusing said instruction defendant excepted.

On behalf of defendant it is contended that the first instruction, given at plaintiff's instance, is erroneous, for that it requires the defendant to give both statutory signals in order to escape liability. This view of the instruction is incorrect. In its first clause it plainly tells the jury that it was the duty of the defendant to give one or the other of the two statutory signals, and its latter clause tells them, that if defendant neglected to ring the bell, and, also, neglected to sound the whistle, that this failure would render defendant liable, etc. If the latter portion of the instruction were in the alternative, telling them that if the defendant "failed to sound a whistle, or failed to ring a bell" then it would be similar to the one given in *Turner's case*, 78 Mo. 578, and obnoxious to the same objection. An instruction such as that would have based liability on the failure to give either signal, while the instruction in controversy, only bases liability on the entire failure to ring the bell, and the entire failure to sound the whistle. In a word, failure to ring the bell, and failure to sound the whistle must have concurred in order to have cast liability on the defendant, nothing short of such entire failure in both these particulars, would have accomplished this, and so, in substance and effect, the instruction reads. Viewed in this light it is not justly subject to the criticism made upon it.

It is claimed that the evidence is wholly insufficient to support the verdict. It is true that there was no direct evidence to establish a collision between the train and the mule, and there was direct evidence that there was no such collision. In the absence of any evidence on the point of collision, of course, there could be no recovery. *Lafferty v. Railroad Co.*, 44 Mo. 291; *Hughes v. Railroad Co.*, 66

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Mo. 325; *Seibert v. Railroad Co.*, 72 Mo. 565. With the mere sufficiency of the evidence this court has no concern. By the uncontradicted testimony of one witness there was snow on the ground, and by the uncontradicted testimony of two witnesses, there were no tracks between the railroad track and the willow tree on the north side of which the mule lay dead. If these statements of these two witnesses were true, and of their credibility the jury were to judge, it was impossible that the mule crossed the track unassisted by the train, unless the jury were prepared to believe that the mule standing on the railroad track was capable of clearing a distance of twenty feet at a single jump, striking against the south side of the willow tree with sufficient force to kill itself, and yet be found on the north side of the tree with no marks of injury or violence on the mule, except a small place on the left hind leg near the hoof, and no marks or abrasions, so far as testified to, on the tree.

Besides, the theory of the plaintiff, that it was the train that killed the mule, is supported by the testimony of the engineer that if the train had struck the mule it would have been thrown forward in the direction the train was moving. If we take it for granted, that the mule was about the center of the highway at the time the train going eastward came on (for the mule was found on the east line of the highway) and if we assume that the mule attempted to cross the railroad track in the middle of the highway, and that the highway was the usual width, forty feet, and that the mule jumped to the east line of the highway, and twenty feet north of the railroad track, this jump would have been considerably over twenty feet; a jump of such dimensions as might well be calculated to excite disbelief, even in the minds of those familiar with the saltant attributes of a mule. All these matters were, doubtless, considered by the jury, and it cannot, therefore, be said that their verdict on the point of collision, was without anything on which to base it.

Nor was the verdict without evidence in its support,

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in other particulars. There was evidence tending to show a failure to comply with the statute as to signals, and that the servants of defendant were guilty of negligence. It was in evidence that the crossing could have been seen 130 yards to the westward, and yet the engineer does not say how far he was from the mule when he saw it, and the fireman did not see the mule until it was across the track. In approaching a public crossing it is the duty of those who handle such dangerous machinery as a railroad train to be on the lookout, as well as to give the statutory signals. We have held it obligatory on persons approaching a public crossing to look and listen, lest they be injured by the cars, and certainly it must be obligatory on those engaged in managing such deadly instrumentalities; it must be the reciprocal duty of such persons to be equally on the alert, when approaching a locality of that description. For this reason the second instruction for plaintiff was properly given.

Therefore, judgment affirmed. All concur

LANDIS, *Guardian*, v. EPPSTEIN, *Administrator, Appellant*.

Will, Construction of. A will construed in connection with extrinsic evidence and held that the guardian of a minor, where certain bequests were made to the latter, and not the administrator of the estate, was entitled to their possession.

Appeal from Cooper Circuit Court.—HON. E. L. EDWARDS,
Judge.

AFFIRMED.

Cosgrove, Johnston & Pigott for appellant.

The first and great rule in the exposition of wills is,

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that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet. 68; *Pray v. Belt*, 1 Pet. 670; *O'Hara on Wills*, p. 29; *Turner v. Timberlake*, 53 Mo. 371; *Gaines v. Fender*, 57 Mo. 342; *Carr v. Dingo*, 58 Mo. 400; *Smith v. Hutchinson*, 61 Mo. 83; *Allison v. Chaney*, 63 Mo. 279. If two parts of a will are totally irreconcilable, the rule is to take the subsequent words as an indication of a subsequent intention. *Sims v. Doughty*, 5 Ves. 247; *Norris v. Beyea*, 13 N. Y. 284; *Bradstreet v. Clark*, 12 Wend. 665. The body of the will and the codicil are to be taken as constituting testator's will, and if the codicil is inconsistent with the will, the former will prevail. *Cobb v. Denton*, Supreme Court, Tenn.; *The Reporter*, vol. 8, p. 669; *Livingston v. Murray*, 68 N. Y. 490. It is truly said that the first grant and the last will are of the greatest force. 1 *Williams on Executors*, (6 Am. Ed.) bottom pp. 10, 12. It is clear from the provision of the codicil of said will that it was the intention of the testator that plaintiff's ward should not receive more than the interest on said bequest until his arrival at the age of twenty-one years. The condition precedent to Edward Zey's taking anything except interest under the will, is his attaining the age of twenty-one years, until then nothing vests in him, and the property very properly remains in the hands of the administrator. *Wells v. Wells*, 10 Mo. 193; *Overton v. Davy*, 20 Mo. 273; *Tyson v. Blake*, 22 N. Y. 558; *Norris v. Beyea*, 13 N. Y. 273. The legacy bequeathed to Edward Zey is not the specific bequest of a particular chattel, which the said Edward Zey would be entitled to have the use of prior to arriving at the age of twenty-one, but is a legacy of money which he is entitled to receive only upon the contingency of becoming twenty-one years of age, and it is the duty of the administrator, Eppstein, to preserve the principal so that in case of the death of the said Edward before arriving at the age of twenty-one, the same may be equally divided among the surviving lawful heirs of John Zey, deceased. *Field v.*

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Hitchcock, 17 Pick. 128; *Wooten v. Birch*, 2 Md. Ch. Dec. 190; *Livingston v. Murray*, 68 N. Y. 485

Rice & Walker for respondent.

The guardian is entitled to the possession of the legacies. There is no conflict between the codicil and the seventh clause of the will. The only intention of the former is to create a remainder over, and the seventh clause specifically directing the delivery of the \$800 note to the guardian, is not to yield to any doubtful language of the codicil. Redfield on Wills, (Ed. 1864) pp. 352, 434, 438, 464. Even if the direction in the seventh clause of the will for the delivery of the note to the guardian had been omitted, still he, as such guardian, would have been entitled to its possession. Jarman on Wills, (3 Am. Ed.) side pp. 738, 740, 743, 758, 761. When a life estate is bequeathed in a sum of money, with remainder over, the legatee is entitled only to the income, and the principal, subject to the life estate, belongs to the remainderman. *Tyson v. Blake*, 22 N. Y. 558; 64 N. Y. 278. The respondent is entitled to the \$450, the share of Edward Zey in the lapsed legacy of \$1,800. *Dunning v. Bank*, 61 Mo. 497.

EWING, C.—John Zey, Sr., died testate in Cooper county, Missouri, April 26th, 1877. In the ninth clause of his will he named his son, Michael Zey, as his executor, who refused to qualify; and the appellant, Veit Eppstein, was appointed by the Cooper county probate court, administrator of said estate, September 8th, 1877. He at once qualified and entered upon his duties as such administrator, and published notice of his appointment, as required by law. In the seventh clause of his will, John Zey, Sr., made the following bequest: "I give and bequeath unto Edward Zey, the only living child of Peter Zey, deceased, (the said Peter Zey, deceased, being my son,) the sum of \$800, to be paid by my executor, as follows: My said executor is to deliver

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to the said Edward Zey, only child of Peter Zey, if he be of age at the time of my decease, the note for the sum of \$800 which I hold against Vincens Strickfarden, above described; if said child be not of age, then said note is to be delivered to the guardian of said child, duly appointed, which said delivery of said note by said executor shall be in full payment of this legacy, but my said executor shall collect all the interest which may be due on said note at the date of my decease before transferring the same to said child or his said guardian. It, also, being my express will, that no part of the principal of the bequest hereby made, shall be paid to said child during his minority, but that only the interest shall be used, and that the principal shall be paid to him, when he shall arrive at the age of twenty-one."

In the sixth clause of his will the said John Zey, Sr., gave \$1,800 to his mute son, Jacob, who died in the lifetime of his said father; thereupon, the said John Zey, Sr., divided the \$1,800 into four equal parts, giving at once \$450 to each of his three children, and \$450 to his son Michael, for his grandson, Edward Zey, and requested Michael, whom he had named in his will, as executor, to act as guardian of Edward, but said Michael refused to qualify either as executor or guardian. After the death of the mute, Jacob, the testator made the following codicil to his will: "Whereas, I, John Zey, of Cooper county, and State of Missouri, having made and duly executed my last will and testament, in writing, bearing date of May 6th, 1874. Now I do hereby declare this present writing to be a codicil to my said will and direct the same to be annexed thereto and taken as a part thereof. And now if the said Edward Zey, mentioned in the seventh part of the original will, die before he arrives at the age of twenty-one years, I desire that the bequest therein made, and also his (Edward Zey's) share of the bequest made to my deceased son, Jacob Zey, mentioned in the sixth part of the original will, be equally divided among my lawful surviving heirs.

May 12th, 1879, the respondent was duly appointed by the probate court of St. Clair county, Missouri, guardian of Edward Zey, and qualified as such. More than two years having passed since the publication of notice of his appointment as administrator of the estate of John Zey, Sr., deceased, by the appellant and no claims whatever having been exhibited or presented for allowance, against said estate, the respondent, on the 25th day of March, 1880, filed his petition in the Cooper county probate court, asking that the appellant as administrator be ordered to deliver the said notes to respondent in payment of said legacies, and if said notes had been collected, that said administrator be ordered to pay over the money. The probate court refused to make the order, when respondent appealed to the Cooper circuit court, where, on a trial had at the June term, 1881, the order as prayed for was made, and the respondent, as guardian, required to enter into an additional bond, from which appellant took an appeal to this court.

The plaintiff in the circuit court offered the following evidence: Michael Zey testified, that he was the son of John Zey, deceased, and the person named in the last will of John Zey, deceased, as executor; that Edward Zey is the nephew of witness and resides with his mother and stepfather, the plaintiff, in St. Clair county, Missouri; that prior to his death the said John Zey, divided the shares of his deceased son, Jacob, among his other heirs, and, gave to witness the share of Edward Zey, with instructions to hold the same for him until he became twenty-one years of age, only paying him the interest thereon during his minority; witness further testified that he refused to qualify as executor of said will, whereupon letters of administration with the will annexed were granted to the defendant, Eppstein. There are now living, four heirs of John Zey, deceased. It was his father's request that he should act as guardian of the minor, Edward Zey.

John Zey testified that he was the son of John Zey,

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deceased, and uncle of Edward Zey, minor. He knew it was the wish of his father that the portion of Edward Zey should be retained by his executor until Edward became twenty-one years of age and that before that time only the interest should be paid him.

It was admitted that the notes mentioned in the will of John Zey, deceased, as going to the said Edward Zey, had been reduced to possession by the defendant, Eppstein, and that he has that amount of money in his hands, less the expenses of the administration for which the said Edward Zey is liable.

It is also admitted that the plaintiff, Joseph P. Landis, is the guardian of the person and estate of Edward Zey, minor.

Plaintiff also offered in evidence a certified copy of the last will of John Zey.

The only question in the case is, is the guardian of Edward Zey entitled to the possession of these notes, or the proceeds thereof; or, must the respondent, as administrator of John Zey, Sr., deceased, hold them as a trustee, until Edward Zey attains the age of twenty-one? This involves the construction of the sixth and seventh clauses, and the codicil to the will of John Zey deceased.

It seems very clear that the purpose of the seventh clause of the will was to give the \$800 note to Edward Zey, provided he had attained his majority at the time of the death of the testator. The language is: "I give and bequeath unto Edward Zey * * the sum of \$800 to be paid as follows by my executor. My executor is to deliver to said Edward Zey * * if he be of age at the time of my decease." This seems to be the only condition precedent to its delivery. But he proceeds: "If said child be not of age, then said note is to be delivered to the guardian of said child." The will further providing that the note alone should be so disposed of, after his executor should collect all interest due on it up to the time of the decease of the testator. After the making of the will, the

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evidence discloses the fact that the mute son, Jacob, died, and that his father the testator divided between his other children Jacob's part, which amounted to \$450 to each; that he delivered to Michael the \$450 given to Edward Zey, with the instructions to retain the same and give Edward the interest alone, until he, Edward, should attain his majority, when he should pay over the whole to the said Edward. It further appears after the decease of the testator, Michael Zey, the named executor, refused to qualify, whereupon the appellant, Eppstein, was appointed administrator with the will annexed, and collected, and has in his possession the shares intended for Edward Zey.

After the death of the mute son, Jacob, the testator made a codicil to his will to the effect as follows: "And now if the said Edward Zey, mentioned in the seventh part of the original will, die before he arrives at the age of twenty-one years, I desire that the bequest therein made, and also his (Edward Zey's) share of the bequest made to my deceased son, Jacob Zey, mentioned in the sixth part of the original will, be equally divided among my lawful surviving heirs."

This codicil seems in no wise to change the provisions of the original will, except that it provides where that part bequeathed to Edward should go, provided he (Edward) should die before reaching his majority. This he had a right to do. *Livingston v. Murray*, 68 N. Y. 485. But this does not affect the main question here, which is, shall the administrator retain the share of Edward until he becomes of age, or shall it be paid over to his guardian. This must be arrived at by ascertaining as certainly as may be, the intention of the testator. That intention as far as the \$800 note is concerned is, I think, made clear by the seventh clause of the will above quoted, to-wit: "If said child be not of age, then said note is to be delivered to the guardian of said child when appointed."

The testator's intention as to the \$450 may be arrived at by the testimony of Michael Zey, who said, when speak-

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ing of the \$450 and what the testator did, "he gave to witness the share of Edward Zey with instructions to hold the same for him until he became twenty-one years of age," etc. He further said, "It was my father's request that I should act as guardian of the minor, Edward Zey." Taking these statements in connection with the seventh clause, that if the child was not of age the \$800 should be delivered to the guardian, it seems clear that the testator's intention was that the whole bequest to Edward Zey should go into the hands of his guardian until his majority. The testator nominated Michael Zey, his son, his executor, and requested him to act as Edward's guardian. He refused to act in either capacity.

The canons of construction laid down by the appellant's counsel are undoubtedly correct, but the language of the will and the surrounding facts will not bear out the interpretation suggested. Redfield on Wills (Ed. 1864) p. 352, § 13.

The judgment of the circuit court is affirmed. All concur.

MITCHELL V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant.*

1. **Railroad:** KILLING STOCK: AMENDMENT OF STATEMENT. Under Revised Statutes, section 3060, a statement in a suit brought against a railroad company before a justice of the peace for double damages for killing stock, can, on appeal to the circuit court, be so amended as to allege that the killing occurred in a township adjoining the one in which the suit was brought.
2. ———: ———: EVIDENCE. The evidence must show that the animal was killed in either the township in which the suit is brought or in an adjoining one.

Appeal from Moberly Court of Common Pleas.—HON. G. H. BURCKHARTT, Judge

REVERSED.

Smith & Krauthoff with *Thos. J. Portis* for appellant.

The court below erred in permitting plaintiff to amend his complaint. *Hansberger v. Railroad Co.*, 43 Mo. 196; *Haggard v. Railroad Co.*, 63 Mo. 302; *Webb v. Tweedle*, 30 Mo. 488; *Dillard v. Railroad Co.*, 58 Mo. 69; *Madkins v. Trice*, 65 Mo. 656; *Huff v. Shepard*, 58 Mo. 242. Nor can the amendment be justified on the theory that it was authorized by Revised Statutes, section 3060. This section does not change the law as it stood when the decisions cited, *supra*, were made. *Transier v. Railroad Co.*, 54 Mo. 189; *Gilmore v. Dawson*, 64 Mo. 310. The plaintiff's evidence did not show that the animals were killed at a place where it was defendant's duty to fence, and the demurrer to the evidence should, therefore, have been sustained. *Mum-power v. Railroad Co.*, 59 Mo. 245; *Cary v. Railroad Co.*, 60 Mo. 209; *Holman v. Railroad Co.*, 62 Mo. 408; *Crews v. Lackland*, 67 Mo. 619.

Hollis & Wiley for respondent.

PHILIPS, C.—This is an action for damages for killing stock contrary to the provisions of the old 43rd section of the general railroad corporation law of the State. The suit was brought in a justice's court of Sugar Creek township, in Randolph county.

The statement alleged that the horses were killed in Union township, of said county. The plaintiff recovered judgment in the justice's court, from which the defendant appealed to the Moberly court of common pleas. Upon appeal to the court of common pleas, the defendant moved to dismiss the cause for the reason that said court had no

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jurisdiction. Pending this motion the plaintiff filed an amended petition alleging "that defendant was at the time hereinafter mentioned, and still is a railroad corporation, duly chartered and organized under the laws of the State of Missouri, and as such, owned, managed and controlled a certain line of railway extending in and through Union township, in Randolph county, Missouri. That Sugar Creek township, in Randolph county, Missouri, wherein this suit was instituted, is an adjoining township to said Union township." The remainder of the petition was a copy of the original complaint. The court thereupon overruled the motion to dismiss, and the defendant excepted and filed a motion to strike out the amended petition, which being, also, overruled, the defendant again excepted.

The case was tried by the court without the intervention of a jury. At the conclusion of plaintiff's evidence the defendant offered an instruction in the nature of a demurrer thereto, which the court refused. The court found for the plaintiff, and on motion of plaintiff entered judgment for double the assessed value of the property killed. Defendant has brought the case here by appeal.

I. It is assigned for error that the court of common pleas had no authority for permitting the amendment to the statement showing that Sugar Creek township adjoined Union township. It has been held by this court that under the statute authorizing such actions to be brought in justices' courts, the statement must show that the injury complained of occurred in the township where the justice before whom suit is instituted resides. This is a jurisdictional fact that should affirmatively appear from the statement. *Hansberger v. P. R. R. Co.*, 43 Mo. 196, 200; *Haggard v. A. & P. R. R. Co.*, 63 Mo. 302. Since these decisions the statute has been so amended as to permit the action to be brought before a justice of the peace in the township in which the injury occurred, or any adjoining township. R. S., § 2839. The statute in respect to appeals, and proceedings thereon from justices' courts has, also, since been amended by adding

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the following section: "In all cases of appeal * * the statement of plaintiff's cause of action * * filed before the justice, may be amended upon appeal in the appellate court, to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be included in the original account or statement, shall be added by such amendment." R. S., § 3060.

This section was added by the legislature for a purpose. Its language is too plain to admit of much doubt that it meets a case like this, and authorized the amendment permitted by the appellate court below. The only defect in the statement filed with the justice was in not alleging that Sugar Creek township was an adjoining township to Union township. This was certainly a "deficiency or omission therein." If so, by the express terms of said section the statement may be amended in appellate court to supply such deficiency or omission, when substantial justice would thereby be promoted. The only limitation upon this right of amendment imposed by said section, is that no "cause of action not embraced or intended to be included in the original statement shall be added." The cause of action in this case remained precisely the same after the amendment as before. The averment added was merely of the additional fact that the justice before whom the action was brought was of the adjoining township. The amendment certainly tended to promote substantial justice. It took away no substantial right of the defendant, nor added any new burden to his proper defense. The proofs, as to the cause of action, the subject matter of litigation, were the same, both as to the injury and the liability. Had the amendment not been made in the lower court, and the cause had been reversed on account of the omission in the original statement, under the views now entertained by this court of the scope and object of said section 3060, we would remand the cause with leave to plaintiff to so amend his statement. Under the authority of *Rowland v. Railroad*

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Co., 73 Mo. 619, the amendment in question was, perhaps, permissible, without the new section of the statute.

II. But we fail to find in the bill of exceptions one word of proof to sustain the allegations of the statement, either as to the injury having occurred in said Union township or that Sugar creek township adjoins Union township. If these are facts material to be averred they must be established by proof at the trial, otherwise it does not appear that the justice before whom the cause was tried has any jurisdiction to hear the same. For this reason the demurrer to the evidence, offered by the defendant should have been sustained.

The judgment of the common pleas court must therefore be reversed and the cause remanded. All concur.

BARRETT V. BELL, *Appellant*.

1. **Appurtenance, what is.** The term "appurtenance" carries with it no right or interest in property on other lands of the grantor not included in the deed under which the grantee claims. It cannot be made to include anything not situated on the land described, although it belong to the grantor and be used by him in his business.
2. ———. A kettle situated upon a lot not included in the lease of hotel property, and not indispensable to its enjoyment, although a convenience to such property, and used by the grantor in connection therewith, is not an appurtenance thereto, and the grantee may, at any time, be deprived of its use by the grantor.

Appeal from Johnson Circuit Court.—HON. NOAH M. GIVAN,
Judge.

REVERSED.

Smith & Krauthoff for appellant.

The court erred in admitting the statements of Hall to plaintiff at the time of the negotiations between them

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for the assignment of the lease. They were hearsay. *Reed v. Pelletier*, 28 Mo. 173; *O'Neil v. Crain*, 67 Mo. 250. The first instruction given on behalf of plaintiff was wrong. It submitted to the jury a question of law. Plaintiff's second instruction was wrong. It declared that plaintiff's claim could only be sustained upon the ground that the kettle was an appurtenance belonging to the hotel. Appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing. Burrill's Law Dictionary. "The true test as to whether a thing is an incident or appurtenance, seems to be the propriety of relation between the principal and adjunct which is to be ascertained by considering whether they agree in nature and quality, so as to be capable of union without incongruity, and is actually and directly necessary to the full enjoyment of the property." Wood on Landlord and Tenant, § 213, pp. 310, 311, 312 note; *Ogden v. Jennings*, 62 N. Y. 526, 531, and cases cited, pp. 531, 532. It was wrong, therefore, to tell the jury "appurtenances" meant "all property, real or personal, that was used as part of the hotel." This action must rest solely upon the language of the lease. *Spaulding v. Abbott*, 55 N. H. 423, 427. There is nothing to support the requirement of the law that this kettle must have been an actual necessity, and, as a matter of convenience, it was a mere privilege which Bell had a right to extinguish at any time. *Grant v. Chase*, 17 Mass. 443; *Johnson v. Jordan*, 2 Met. 234. The third instruction asked by defendant should have been given. The word appurtenance will carry with it no rights or interest in property of the grantor on other lands owned by him. In order to pass, the property must be situated upon the same land. *Bolton v. Bolton*, 11 Ch. Div. 969; *Leonard v. White*, 7 Mass. 6; *Frey v. Drahos*, 6 Neb. 1; *Maitland v. Mackinnon*, 1 Hurl. & Colt. 607.

January & White for respondent.

SHERWOOD, J.—Action brought before a justice of the peace to recover damages alleged to have been suffered by plaintiff, because of the removal by defendant of a certain iron kettle from certain premises alleged to have been leased to the plaintiff by the defendant; and it was, also, alleged in the complaint that the kettle was a fixture, and constituted a portion of the leased premises, *i. e.*, the “Bell House” and the property appurtenant thereto. The answer of the defendant was a general denial.

Upon the trial, the plaintiff testified in his own behalf, that since June, 1880, he had been the proprietor of the “Bell House” in the town of Holden, and in connection with it used the kettle in question for heating water with which to scrub the floors and clean the hotel. The kettle was situate on lots 30 and 31, north of the hotel; that he had possession of the “Bell House” by virtue of a written lease made by the defendant to one R. P. Hall, dated October 1, 1878, for three years, and by Hall assigned to him on July 1, 1880, with the consent of defendant.

The said lease was then offered in evidence. The portion material to this case was the granting clause, which was as follows: “That the said Richard Bell has this day leased and rented to the said R. P. Hall, for and during the three years from and after the first day of October, 1878, the Bell House in the town of Holden, Johnson county, Missouri, situate on the north part of lots 60 and 61, said ground being forty-six feet front on Pine street by 138 feet deep in said town, with all the appurtenances thereunto belonging.”

It is quite apparent from the language of the complaint, as well as the language of the lease, that the controlling question in this case is whether the kettle, which was not on the lots specified in the lease, but was set in an iron arch or furnace, situated on lots 30 and 31, north of the hotel, and separated from the lots on which the hotel

was built by an alley some twelve feet in width, was one of the "appurtenances" belonging to the hotel and embraced within the terms and specifications of the lease. The lease, it will be noted, and as before stated, does not embrace the lots on which the kettle was situated, nor is there any evidence that defendant was owner of those lots.

The term "appurtenances" carries with it no rights or interest in property of the grantor on other lands which he owns, lands not included in the deed under which the grantee claims. *Bolton v. Bolton*, 11 Ch. Div. 968; *Leonard v. White*, 7 Mass. 6. It cannot be made to include anything not situate on the land described, though it belong to the grantor and be used by him in his business. *Frey v. Drachos*, 6 Neb. 1. In that case, the mortgage described the property as "one frame grain elevator warehouse situated on the ground of the Sioux City & Pacific R. R. Co., east of their side track, etc., etc., with all the appurtenances thereto belonging."

Other property, however, in addition to that mentioned was sold under the mortgage, to-wit: An engine and boiler complete, grate bar, wrenches, gauge cock, pump and pipe, rubber belt, bars of iron, one engine house, one Fairbanks scales complete and one office ten by twelve feet in size, as among the "appurtenances," embraced in the mortgage. The office building and Fairbanks scales, engine, etc., were at least 100 feet distant from the elevator warehouse, and used by the owners in the prosecution of other business, as well as in handling grain, and the engine, etc., was also used for other purposes and was not connected with the machinery of the warehouse, except as occasionally connected by means of the rubber belt, when that machinery was in operation, and when not so in operation, the rubber belt was taken off and laid aside; and it was ruled that no property, outside of that described in the mortgage, passed by that instrument, or was embraced in the general term "appurtenances thereto belonging."

And where there was a conveyance of a specific tract

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of land, this was held not to carry with it as appurtenant, property not situate upon the land described. And this rule was applied to a case of a well and an out house on an adjoining tract owned by the grantor, and to a way to them over such tract. *Grant v. Chase*, 17 Mass. 443. Again, it does not appear in evidence that the use of the kettle was indispensable to the enjoyment of the premises conveyed, and unless this were so, such use could, in no circumstances be regarded as appurtenant to the hotel. The lease was still effectual and the hotel useful after the kettle was taken away. The fact that the kettle was a convenience, does not make it an appurtenance nor have any effect upon the construction of the lease. *Spaulding v. Abbott*, 55 N. H. 423, and case cited.

In a well considered case in the court of appeals of New York, it was said: "Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as incident or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. *

* When the necessity ceases, the rights resulting from it cease. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases, the question of necessity controls." *Ogden v. Jennings*, 62 N. Y. 526, 531, and case cited, pp. 531, 532.

In a valuable work on Landlord and Tenant, the following is deduced as the rule: "The true test as to whether a thing is an incident or appurtenance seems to be the propriety of relation between the principal and adjunct which is to be ascertained by considering whether they agree in nature and quality, so as to be capable of union without

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incongruity, and is actually and directly necessary to the full enjoyment of the property." Wood on Land. and Ten., § 213, pp. 310, 311, and note on p. 312.

As the evidence in this case does not show the use of the kettle was a "necessity" this fact deprives such use of the chief attributes of an appurtenance. "It was a matter of ease and convenience only," which having arisen by mere consent of the parties, could be destroyed by withdrawing that consent at any time. *Grant v. Chase, supra*; *Johnson v. Jordon*, 2 Met. 234.

For these reasons, the cause was not tried upon the correct theory and the judgment should be reversed and the cause remanded. All concur, except Hough, C. J., absent.

CLIFTON *et al.*, Appellants, v. SPARKS.

1. **Practice:** RELIEF FROM APPELLANT'S OWN ERROR: INSTRUCTION. A party cannot insist upon a reversal of a judgment because of error in his own instruction.
2. **Vendor:** VENDEE: CONTRACT: WARRANTY. Where a vendee buys a number of cattle, and by the terms of the contract of sale they are to be weighed upon the vendor's scales, and paid for according to the weight as determined by said scales, there is an implied warranty on the part of the vendor that such shall be lawful scales, and capable of indicating lawful weights, and the vendor is liable to the vendee for all money paid him by the latter by reason of excessive weights, as indicated by the defective scales, although there was no pretense of actual fraud on the part of the vendor.

Appeal from Morgan Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

A. W. Anthony and Cosgrove, Johnston & Pigott for appellants.

1. By the terms of the contract of sale the cattle were to be weighed on defendant's scales, and this was an affirmation on the part of the defendant that the weight of said cattle, as given, was correct. The weighing was as material a part of the contract of sale as paying for them. *Smithers v. Bircher*, 2 Mo. App. 511; 1 Parsons on Contracts, (6 Ed.) top p. 579. 2. The second instruction given on behalf of defendant is erroneous, because it tells the jury the plaintiff cannot recover in the absence of fraud; if there was a warranty (either expressed or implied) by the defendant, it was not necessary that there should have been any fraud on his part to authorize a recovery by plaintiff. *Branson v. Turner*, 77 Mo. 489. "It is not always absolutely necessary that an actual falsehood should be uttered to render a party liable in an action of deceit, if he states material facts as of his own knowledge, and not as a mere matter of opinion or general assertion about a matter of which he has no knowledge whatever, this distinct, willful statement, in ignorance of the truth, is the same as the statement of a known falsehood." *Dulaney v. Rogers*, 64 Mo. 201; *Caldwell v. Henry*, 76 Mo. 254; *Dunn v. Oldham*, 63 Mo. 181; *Raley v. Williams*, 73 Mo. 310; Kerr on Fraud and Mistake, (Bumps Am. Ed.) pp. 60, 68, 69, 75, 81. When a man sells by his own scales, the law implies a warranty that they are correct.

Draffen & Williams and *D. E. Wray* for respondent.

It was not the contract, that the cattle should be paid for at so much per pound, but should be paid for at so much per pound, the weight to be determined by these particular scales. The objection seems to be the contract itself. The instruction was correct. The contract was valid, and, in the absence of fraud, the parties were bound

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by it. *Nofsinger v. Ring*, 71 Mo. 149; *Butler v. Winona Mill Co.*, 13 Cent. Law Jour. 216; *Lynn v. Railroad Co.*, 45 Am. Rep. 741. See, also, *Gibson v. Cranage*, 33 Am. Rep. 351; *Zaleski v. Clark*, 26 Am. Rep. 446; *Whiteman v. Mayor of New York*, 21 Hun. 117; *Hudson v. McCartney*, 33 Wis. 331. Parties have the right to make their own contracts, and when the agreements do not contravene public policy, the courts will enforce them. There is nothing in the record to show that the appellants entered into the contract through mistake. For aught that appears, they may have known, and doubtless did know, all about the scales, when they agreed to purchase the cattle by this weight.

MARTIN, C.—The plaintiffs brought suit before a justice of the peace to recover from defendant \$140, alleged to have been erroneously overpaid by him in the purchase of some cattle. In their written statement, plaintiffs allege that “they purchased of said defendant forty-one head of beef cattle at four and one-fourth cents per pound, gross weight, and one at three cents per pound, gross weight, making forty-two head of cattle in all; that defendant weighed them on his own scales which he said gave correct weights; that the forty-one head, as weighed by defendant upon his scales, weighed 56,134 pounds, and one weighed 1460 pounds, as weighed by him. Plaintiffs say they paid him the price agreed upon for said number of pounds, without at the time knowing that said weights were erroneous and largely in excess of the true weights. Plaintiffs aver that said scales were defective and false and the said cattle erroneously weighed, and that the true weight of the cattle at the time of the purchase, and when they were weighed by defendant was only 55,074 pounds, instead of 57,594. Wherefore by reason of the premises, plaintiffs say they are damaged in the sum of \$140, for which they ask judgment.” The judgment before the justice was in favor of defendant. The plaintiffs appealed to the circuit court where the issues were tried by a jury and found in favor of

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defendant, from which the plaintiffs appealed to this court.

To sustain the issues on their part the plaintiffs submitted evidence to the jury showing that in the month of January, 1880, they purchased forty-two head of cattle from the defendant, and that the contract price was four and a quarter cents per pound for forty-one head of the cattle and three cents for the other one; that by the contract the cattle were to be weighed upon the defendant's scales upon his premises, and were to be paid for by the weight that they weighed upon said scales, and the weight thereof as shown by said scales was 57594 pounds and that the plaintiffs paid for said cattle at said weight; they then offered evidence tending to show that defendant's scales were out of order and that the weight of the cattle, as shown by said scales, was greater than the true weight.

The defendant offered evidence tending to show that the scales were correct, and that the cattle were properly weighed upon the same. At the instance of plaintiffs, the court gave the following instruction which was repeated in different language in two other instructions:

The jury are instructed that if they believe from the evidence that the scales of Sparks were out of order and did not weigh correctly, and that in the condition they were in at the time the cattle mentioned in the complaint were weighed, they made the cattle weigh heavier than their actual weight, then the jury must find for the plaintiffs and render their verdict for such an amount as damages as they believe from the evidence plaintiffs have sustained in consequence of said erroneous weight.

The court gave the following instructions at the instance of defendant:

If the jury believe from the evidence that defendant sold to plaintiffs forty-one head of cattle at four and a quarter cents per pound and one at three cents per pound, gross weight, and that it was understood and agreed between them, and that it was a part of the contract that said cattle were to be weighed on defendant's premises and

on his own scales and that plaintiffs were to pay for them according to the weight as determined by said scales, and that they were so paid for, then the plaintiffs cannot recover in this case in the absence of fraud and the jury will find for the defendant.

It is apparent that these two instructions are inconsistent. In one the jury is instructed to find for plaintiffs if the scales were imperfect and furnished erroneous and excessive weights. In the other, they are instructed to find for defendant if the cattle were paid for according to the weight, as determined by the scales, however imperfect or erroneous they may have been, provided there was no fraud in the transaction. There was no pretense of evidence of actual fraud on the part of defendant. If the instruction given at the instance of defendant is correct then the instruction given at the instance of plaintiffs is erroneous. But I apprehend they could not insist on a reversal of the case for error in their own instruction.

The single question for us to determine on this appeal is, whether the instruction given at defendant's request is correct. It will be noticed that in the statement filed before the magistrate it is alleged that the defendant said his scales "gave correct weight." This evidence fails to disclose any express declaration of his to that effect. The plaintiffs maintain that the contract, as proved, substantially contains, or implies a warranty of that import, and that the instruction given for defendant necessarily ignores such warranty. The learned counsel of defendant contend that as the cattle were to be weighed on the defendant's scales, and were to be paid for according to that weight, the plaintiffs are bound to pay according to such weight in the absence of fraud, whether it is the true weight or not. In support of this view they cite a class of cases in which it is held that in the absence of fraud, the parties to a contract are bound by the decision or estimate of a third party, agreed upon between them, to determine any of the conditions or ingredients necessary to complete the obligation to pay the

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consideration of the contract. I failed to perceive the application of these cases to the point before us. I do not think that the parties to this contract in adopting the scales of defendant could have had in view any results differing materially from the results to be expected from any other set of scales used at the same time and place. The variation of results produced by lawful scales is too insignificant to be compared with the range of results proceeding from the discretion and fallible estimates of arbiters or referees. A discrepancy of 2,500 pounds in weighing forty-two head of cattle is entirely beyond the infinitesimal variations possible in lawful scales, and could not reasonably have been within the honest contemplation of either party.

The statutes of this state establish a standard of measures and weights. 2 R. S. 1879, Chap. 167, p. 1499. The clerk of each county court is required to provide the county with a set of avoirdupois weights and to give public notice of such fact. Any person who knowingly keeps any measures or weights, or buys or sells by such measures or weights, as shall not correspond with the measures and weights provided by the county clerk, subjects himself to a fine of ten dollars for each and every such offense. To suit the convenience of the parties, or to save the loss of weight by transportation, it was proper enough for them to contract that the weighing should be done on defendant's premises by his scales. But under the law which establishes an absolute and invariable standard of weight, neither party could be regarded as contracting with reference to any material variation of such scales from the lawful standard. The defendant had no right to keep or use on his premises any scales for weighing cattle or other commodities for sale which did not furnish true avoirdupois weights according to the established standard. The contract required the defendant to furnish scales for weighing on his premises free of charge. I do not perceive how he could discharge this duty imposed on him by the contract without furnishing lawful and correct scales. The

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obligation to furnish scales at all contains the necessary implication and warranty that they shall be lawful scales capable of indicating correct avoirdupois weights. Such warranty is all the stronger against the defendant who had every opportunity to know, and ought to have known whether the scales kept on his premises and used by him were true and correct. Whether he knowingly or negligently made use of erroneous scales in weighing the cattle sold by him, there is nothing in the terms of his contract which will justify him in retaining the money received by him through means of erroneous weights. For the amount so received he has parted with no consideration whatever. If the scales were out of order and produced erroneous weights unknown to the parties before payment, then so much of the money as was received by reason of excessive weights was paid under a mistake of fact and should be returned to plaintiffs. I do not think that either party, by virtue of the contract, accepted the risk and contingency of false scales. "A false balance is abomination to the Lord; but a just weight is his delight." Prov., Chap. 2, 1.

The instruction given at the instance of defendant was erroneous. The one given at the instance of plaintiff's was substantially correct. In accordance with this conclusion the judgment is reversed and the cause remanded. All concur.

THE BELCHER SUGAR REFINING COMPANY, *Appellant*, v. THE ST. LOUIS GRAIN ELEVATOR COMPANY.

1. **Condemnation of Private Property for Public use:** DEDICATION. When private property is condemned or dedicated for one public use, it cannot be appropriated to another and different use, or be appropriated to private use.
2. —: TITLE: DIFFERENT USE. The fee simple title is not acquired by proceedings condemning private property for public use, and if

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such property is to be used for a purpose other than that for which it was condemned, the original owner must first be compensated for such additional different use.

3. ——— : ——— : ———. Where the city of St. Louis condemned private property for use as a wharf, it cannot lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain.
4. ——— : CONSTRUCTION. Laws authorizing the taking of private property for public use, should be strictly construed and closely scrutinized.

Appeal from St. Louis Court of Appeals.

REVERSED.

Smith P. Gault for appellant.

The lease of the city to the defendant and defendant's proposed occupation of the premises are illegal, 1st, Because it is a diversion of the use in the property condemned, and a violation of the trust assumed by the city; 2nd, It is placing an additional burden upon the property, the fee thereof being in the plaintiff, not contemplated in the condemnation proceedings; 3rd, It being an additional burden, if the proposed warehouse is considered for public use, it is taking and damaging plaintiff's property without compensation, contrary to the common law, and section 21, article 2 of the constitution of Missouri; if considered for private use, it is in violation of section 20, same article; 4th, It is a violation of the city's implied contract made with the plaintiff, when it paid to the city the \$2,350, as benefits to his property, that the city would hold the property strictly in accordance with the purposes expressed, and by which the company would be benefited, and that they would not be changed, so that those benefits would be destroyed; 5th, On all these questions the plaintiff, by reason of being adjoining and adjacent to this portion of the wharf, as well as the owner in fee of the premises, may invoke the power of a court of equity, and there obtain protection by injunc-

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tion from the threatened wrong. *Allen v. Jones*, 48 Ind. 442; *Inlay v. Railroad Co.*, 26 Conn. 255; *Hart v. Burnett*, 15 Cal. 492; *Williams v. Plank Road Co.*, 21 Mo. 582; *Barney v. Keokuk*, 94 U. S. 324; *Rutherford v. Taylor*, 38 Mo. 315; *Price v. Thompson*, 48 Mo. 303; *Ill., etc., Canal Co., v. St. Louis*, 2 Dill. C. C. 70, *Pres. Soc. v. Railroad Co.*, 3 Hill 567; *Louisville v. Louisville Rolling Mill Co.*, 3 Bush 416; *Trenor v. Jackson*, 46 How. Pr. 397; *Thompson on Highways*, p. 1; *Board of Education v. Edson*, 18 Ohio St. 225; *Warren v. Lyons City*, 22 Iowa 357; *State v. Laverack*, 34 N. J. L. 202; *Barclay v. Howell's Lessee*, 6 Pet. 31; *Lade v. Shepherd*, 2 Strange 1004.

Broadhead & Haussler for respondent.

"The mode of using property dedicated for a wharf may change from time to time, as the wants of commerce, or of the public may require." *Illinois Canal Co. v. St. Louis*, 2 Dill. C. C. 91. If the conveniences of commerce require it, the city may use the wharf so as to accommodate those requirements, or it may authorize others to do so; and how long it may be so used, must necessarily depend upon the judgment and discretion of the State. But if this were not so, the wharf belongs to the city, and no one, therefore, but the State has the right to question its authority for using it as provided for in this case, or to ask the court to prohibit it. As to the authority of the State to vest the fee in the city, see *Rexford v. Knight*, 1 Kernan 308; *Hayward v. The Mayor*, 3 Selden 314; *Ellis v. Railroad Co.*, 51 Mo. 202. As early as the act of December 18th, 1824, (see Rev. Code 1825, p. 763,) all recorded plats of towns and villages vested the fee simple title in the county of all property named or intended for public use; and the act of February 20th, 1865, was intended to pass the title of such property from the county to the city, and also to provide that the city should own all property thereafter condemned or dedicated for public use.

HENRY, J.—The plaintiff owned in the city of St. Louis all of city block No. 225, and nearly all of block 226. These blocks extend to the Mississippi river, and in 1867, in condemnation proceedings instituted by the city, a portion of the property was condemned for wharf purposes, and plaintiff was allowed \$23,993 damages, and was assessed for benefits \$2,350. The difference between the two amounts was paid to plaintiff, who subsequently acquired all that it owns of block 226, except thirty feet which it owned when the condemnation was had. In 1871 the city graded the wharf in front of these blocks, and in 1872 ripped 350 feet of the wharf, but the work was destroyed by the high waters in 1873. On the 8th of August, 1879, the city leased to the defendant for twenty years, at an unusual rent of \$300, all of the property condemned in front of block 226, 319 feet along the river by ninety feet deep.

The city charter then in force authorized the city: "To establish, open, vacate, alter, widen, extend, pave, and otherwise improve all wharves," to erect docks and wharves and "to set aside or lease portions of the unpaved wharf for special purposes, such as the erection of sheds, elevators, and warehouses, * * * and for any purpose tending to facilitate the trade of the city; but no permit to use any portion of the wharf or any lease of the same shall be granted for a term exceeding fifty years."

The plaintiff is engaged in the business of refining sugar, and owns blocks of land west of those fronting on the river, on which are extensive buildings, used in its business. They receive annually 75,000 tons of sugar which is unloaded nearly one mile below their buildings, and this suit is to restrain defendant from erecting a large warehouse on the wharf, which will occupy all of said wharf in front of block 226. That portion of the wharf which was leased to defendant was leased to be used "for erecting and maintaining a shed, or warehouse for the storage and handling

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of grain, or other merchandise, in connection with the use of its elevator, and * * * to lay railroad tracks on said portion of said wharf, and to connect the same with the tracks of any railroad having a right to lay and operate a track on the wharf or levee." The plaintiff's bill was dismissed by the circuit court on the hearing of the cause, and on appeal to the court of appeals, the judgment was affirmed and plaintiff has appealed to this court.

Several important questions are discussed in the briefs of counsel, but there is a controlling question in the case which, in the view we take of it, renders it unnecessary to consider any other. It is conceded, and the authorities are all in accord on the subject, that, when private property is condemned, or dedicated, for one public use, it cannot be appropriated to another and different use. The doctrine is tersely stated in the case of *Imlay v. Union Branch R. R. Co.*, 26 Conn. 255, as follows: "When land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use." In *Williams v. The Natural Bridge Plank Road Co.*, 21 Mo. 532, the doctrine was concisely announced by Judge Scott, in the following language: "The grant of a right of way for one purpose will not authorize the use of the road for another and different purpose."

Our constitution, when the property in question was condemned, declared: "That no private property ought to be taken, or applied to public use, without just compensation." The fee simple title was not acquired by the city under the condemnation proceedings, and all the compensation plaintiff received, was for the use of his property for a public wharf. If any burden, other than that, is to be imposed upon it, by the city of St. Louis, the plaintiff must first be compensated for such additional different use. The city of St. Louis has no right to erect a permanent building upon the property condemned, except for the use of the wharf, so occupied and of the building so erected for legitimate wharf purposes. The legislature of the

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State could not authorize any other use of the property of the city, than that for which it was condemned.

These elementary propositions, we think, will not be controverted, but the contention is, that elevators and warehouses in great commercial cities, have become necessities for handling grain and other produce, and that the erection and use of such structures for shipping and unloading produce upon and from steamboats, and other vessels, is not a different use of the property from that for which it was originally condemned. This proposition may be conceded. As was said by Judge Dillon in *The Illinois etc., Canal Co. v. St. Louis*, 2 Dillon C. C. R. 82: "The extent of the dedication, its scope remains the same, but the mode of using property dedicated for a wharf may change, from time to time as the wants of commerce, or the public may require, and this the dedicator is presumed, to contemplate, when he makes the dedication." In order to meet the demands of commerce, and the changed methods of handling grain and other produce the city may license the erection of elevators and warehouses in connection with them, upon the unpaved portion of the wharf, without violating the rights of the owners of the fee, but she has no right to lease any portion of it for a term of years without a reservation of the right to cancel the lease, whenever it should become necessary to pave and extend the wharf so leased. No right to authorize the erection of such buildings, as that which it is alleged the defendant is about to erect upon the wharf, without reserving a control over the building, and the uses to which it may be applied. Otherwise it is but a lease of a portion of the land condemned solely for public use for wharf purposes, for the private use and private gain of the lessee.

The owner of the building may open or close it at his pleasure, and discriminate between shippers and receivers of produce, and make his as strictly a private business, as if a retail dry goods merchant were permitted to erect a building on the wharf to conduct his business

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in. There is no reservation by the city in the lease to defendant, of any control whatever of the building, or business. The property is conveyed away from the city for twenty years, and, if at any time within that period, it should become necessary to extend the wharf and pave it in front of the block in question, the needed work could not be done. The city has no right, and can acquire none from the legislature, to make such a disposition of the property condemned for wharf purposes, as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect. Laws which authorize the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights, but an imperative public necessity, and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds prescribed by the constitution and the law.

It would not do to permit property condemned for one purpose to be used for another and different purpose, or property condemned for public use to be appropriated to private use. The latter can no more be done, than could the property in the first instance have been condemned for such use. The authorities which support the foregoing propositions of law are numerous, but we will content ourselves with the citation of the following:

Imlay v. Union Br. R. R. Co., 26 Conn. 255; *Williams v. Natural Bridge Plank Road Co.*, 21 Mo. 582; *Rutherford v. Taylor*, 38 Mo. 315; *Price v. Thompson*, 48 Mo. 363; *Ill., etc., Canal Co. v. St. Louis*, 2 Dillon C. C. 82; *Pres. Society v. Auburn, etc., R. R. Co.*, 3 Hill 567; *Trenor v. Jackson*, 46 How, Pr. R. 397; *Louisville v. Louisville Rolling Mill Co.*, 3 Bush. 416; *Barclay v. Howell's Lessee*, 6 Pet. 498; *State v. Laverack*, 34 N. J. L. 203; *Warren v. Lyons City*, 22 Iowa 357; *Board Education v. Edson*, 18 Ohio St. 225; *Barney v. Keokuk*, 94 U. S. 324.

The judgment of the court of appeals is reversed and

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the cause remanded to that court, which will remand it to the circuit court, with directions to proceed with the cause, in conformity with this opinion. All concur

MINTER V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Railroads: KILLING STOCK: STATEMENT: EVIDENCE.** A statement filed before a justice of the peace against a railroad for killing stock, and which is in the form of an account by plaintiff, "for killing three hogs, his property, on the 31st of July, 1881, at Arnold Station, in Gallatin township, Clay county, Missouri, \$22," will admit proof of failure to fence as a ground for recovery, under the 5th section of the damage act. Wag. Stat., p. 520; R. S., § 2124.
2. **Killing Stock: STATEMENT: AMENDMENT.** Such statement is susceptible of amendment, under Revised Statutes, section 3060, so as to allege in terms the absence of a lawful fence where the accident occurred, but the effect of the amendment would be to limit the plaintiff in his proof to the absence of the fence as a ground of recovery.

Appeal from Clay Circuit Court.—HON. GEORGE W. DUNN,
Judge.

AFFIRMED.

George W. Easley for appellant.

The original statement was a common law action; the amended statement was under the damage act. "It is evident that the whole cause of action was here changed. Instead of a common law action it was based on a statutory provision, clothed with new incidents and requiring different proofs." *Hansberger v. Railroad Co.*, 43 Mo. 199.

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Simrall & Sandusky for respondent.

The lower court did not err in permitting the amendment. *Calvert v. Railroad Co.*, 34 Mo. 242, and 38 Mo. 467; *Iba v. Railroad Co.*, 45 Mo. 470; *Norton v. Railroad Co.*, 48 Mo. 388; *Iby v. Railroad Co.*, 54 Mo. 469; *Coughlan v. Lyons*, 24 Mo. 533.

PHILIPS, C.—This action was begun before a justice of the peace by filing the following amended statement:

Hannibal and St. Joseph Railroad Company,	
To John F. Minter,	Dr.
For killing three hogs, his property, on the 31st of July, 1881, at Arnold station, in Gallatin township, Clay county, Missouri.....	\$22.00

Plaintiff recovered judgment from which defendant appealed to the circuit court. In the circuit court the plaintiff against the objection of defendant, by leave of the court, filed the following statement:

Hannibal and St. Joseph Railroad Company	
To John F. Minter,	Dr.

To defendant negligently and wrongfully killing (3) three hogs of plaintiff on or about the 31st day of July, 1881, at a point on track of defendant's railroad company where same passes through Gallatin township, Clay county, Missouri, and where the track of defendant was not enclosed by a lawful fence, and where defendant could have lawfully fenced its said track, said hogs being killed because said defendant did not have its track lawfully fenced at said point, and that said hogs were reasonably worth about (\$22) twenty-two dollars.

Plaintiff again had judgment from which the defendant after ineffectual motion for new trial, etc., has appealed to this court.

I. The principal error assigned by appellant for re-

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versal of this judgment is, the action of the circuit court in permitting the plaintiff to file said amended statement. We are referred by appellant's counsel, in support of this objection, to the case of *Hansberger v. P. R. R. Co.*, 43 Mo. 196. The report of that case does not contain the statement filed with the justice. On examination of the transcript on file here it appears that the original statement in the justice's court, on which the justice rendered judgment, alleged that the railroad company "did injury to plaintiff as follows, that is to say, on or about the month aforesaid, at the county and state aforesaid, the employees of said company did run against, with a locomotive or cars, and did knock down and kill, two head of cattle of the value of \$50, and said cattle belonged to plaintiff." It was of this statement that Wagner, J., in his opinion said: "The original statement filed with the magistrate was in the nature of a declaration at common law, and devolved on the plaintiff the burden of proving negligence in the defendant before he could succeed in maintaining his action." On appeal in the circuit court, the plaintiff filed an amended statement based on the fifth section of the damage act. Of this amendment he observed: "It is evident that the whole cause of action was here changed. Instead of a common law action it is based on a statutory provision, clothed with new incidents and requiring different proofs." Under the statement appealed from in that case to the circuit court the plaintiff would have been required to maintain his action, to prove that the injury resulted from the negligence of the employees of the defendant company in running and managing the train, because by his averments he had limited himself to that character of proof. Whereas by the amendment he proposed to show that the injury resulted from neglect to fence the road at that point on which he might recover without any proof of negligence in running the train. This amendment clearly was not permissible.

But, the case at bar is different. The original state-

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ment was "for killing hogs, etc." It did not limit the proof to any particular character of negligence as the basis of defendant's liability. If a sufficient statement of a cause of action, the plaintiff might have given any proof of a negligent killing, whether of common law negligence or statutory, for failure to fence. In *Calvert v. Railroad Co.*, 34 Mo. 242, this court plainly suggested that under a petition alleging that defendant, a railroad company, did "negligently and carelessly run over, maim and kill certain cattle belonging to plaintiff," the plaintiff might prove, either actual negligence arising from the attendant circumstances of the killing, or mere constructive negligence arising from the failure to erect and maintain a fence. This case was again before this court in 38 Mo. 467 when the railroad made the distinct point that the petition showed only a common law liability, whereas the circuit court had permitted plaintiff to recover under the said 5th section of the damage act. The court again held that it was perfectly competent for the plaintiff to make proof either of the common law negligence "or by showing that the injury was done on a part of the road not enclosed by a lawful fence," etc. This question was again directly presented in the case of *Iba v. Railroad Co.*, 45 Mo. 470. That was an action before a justice of the peace. The statement was as follows:

"Hannibal & St. J. R. R. Co.,

To Henry B. Iba,

Dr.

For damages amounting to \$65 for a cow killed on
railroad or on about 7th day of November,
1867.....\$65.00 "

The court held this to be a sufficient statement to authorize the recovery of single damages, and, also, that under it, proof of the absence of a fence at the point of injury at a place where defendant might have fenced would authorize a recovery, reaffirming the cases above cited. Judge Wagner who had just written the opinion in *Hansberger v. Railroad Co.*, *supra*, concurred in this opinion.

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In *Goodwin v. Railroad Co.*, 75 Mo. 73, the action was instituted in a justice's court. It was based on the carelessness and negligence of the company's servants in managing and running the locomotive and cars. Under this allegation it was held competent for the plaintiff to make proof of failure to ring the bell or sound the whistle, as prescribed by statute, as the basis of recovery. This doctrine is reaffirmed in *Braxton v. Railroad Co.*, 77 Mo. 455. Under the common law count for negligence it is held that the plaintiff "had the right to prove any negligence of the company that contributed to produce the injury complained of, including that of a failure to ring the bell or sound the whistle."

See also, *Mack v. Railroad Co.*, 77 Mo. 234. From all which it is manifest that the proof of failure to fence as the basis of recovery under the 5th section (new section 2124 R. S.) might have been introduced under the original statement. The amendment was permissible under R. S. section 3060. It does not introduce any new cause of action, nor in any wise change the proofs essential to recover for the omission or want of a fence, or devolve upon the defendant any new burden. The effect of the amendment was rather to limit the plaintiff in his proof solely to the absence of the fence, for under the amended statement he could not have made proof of any common law negligence. Of this restriction placed upon plaintiff's line of proof the defendant cannot complain, as the evidence was confined solely to the fact of the injury and the absence of any fence.

It follows that the judgment of the circuit court should be affirmed. All concur, except NORTON and SHERWOOD, JJ., absent.

THE STATE V. RAMSEY, *Plaintiff in Error.*

1. **Criminal Law: INDICTMENT FOR MURDER: PLACE OF WOUND, SUFFICIENCY AS TO.** An indictment for murder in the first degree, which, after the usual averments, charges that defendant "did strike, stab and thrust in and upon the right side of him, the said F., and, also, in and upon the back near the left shoulder of the body, giving to the said F. then and there with the knife aforesaid, in and upon the right side, and, also, upon the back near the left shoulder of him, the said F., one mortal wound of the length of two inches, of the breadth of half an inch and of the depth of three inches," etc., sufficiently locates the wound. and is not bad for repugnancy or inconsistency.
2. **Evidence: RES GESTAE: ANIMUS.** The testimony, on a trial for murder, of a witness present at the difficulty, that while he was endeavoring to quiet the defendant the latter struck the witness, was admissible in evidence as part of the *res gestae*, and as tending to show the *animus* of defendant.
3. —: **MANNER OF DECEASED.** Evidence that the deceased, after the first encounter and while standing near its place, just before the second and fatal encounter "looked scared" and "looked as if he wanted to get away," was admissible on behalf of the State.
4. **Drunkenness, Evidence as to Inadmissible.** The trial court committed no error in refusing to permit a witness to state whether defendant was drunk or sober at the time of the killing, as drunkenness neither excuses nor extenuates crime.
5. **Practice, Criminal: STATEMENT OF COUNSEL.** Defendant's counsel, in stating his case to the jury, should not refer to matters irrelevant to the issues and incompetent as evidence.
6. **Bill of Exceptions: EVIDENCE.** The action of the trial court relating to matters of evidence, unless preserved in the bill of exceptions, is not the subject of review in the Supreme Court.
7. **Murder: INSTRUCTIONS.** Where, on trial for murder, the evidence on behalf of the State tended to establish that the difficulty, which resulted in the death of the deceased, was sought for and brought on by defendant, and that after having provoked, he took advantage of it and fatally stabbed the deceased, and that on the part of defendant tended to prove self-defense; *Held*, that the instructions of the court were properly confined to murder in the first and second degrees, and to justifiable and excusable homicide.
8. **Remarks of Prosecuting Attorney.** Certain remarks of prosecuting attorney, in his closing argument, held to be justified by the evidence.

Error to Stoddard Circuit Court.—HON. R. P. OWEN, Judge.

AFFIRMED.

S. M. Chapman for plaintiff in error.

The indictment is defective in its attempt to locate the alleged mortal wound. The averment is not only inconsistent, but is an impossible statement. 1 Bishop C. P., (3 Ed.) §§ 486, 488; 2 Bishop, §§ 522, 525; 1 Greenleaf Ev., 65; *Comm. v. DeJardin*, 126 Mass. 46; *State v. Curran*, 18 Mo. 320. It was error to admit the testimony of the witness Lance, as to the attack made by defendant on him. *State v. Goetz*, 34 Mo. 91; *State v. Daubert*, 42 Mo. 246; *State v. Harrold*, 38 Mo. 496. The court should have allowed the witness Gillies to answer the question asked by defendant whether the latter was drunk or sober at the time of the difficulty. 1 Bishop C. P., (6 Ed.) §§ 285, 291, 414; *People v. Eastwood*, 14 N. Y. 562. It was error to admit the evidence that the deceased, just prior to the accident, "looked scared" and "as if he wanted to get away." *McAdora v. State*, 59 Ala. 93, 94; *Gassenheimer v. State*, 52 Ala. 314; *Johnson v. State*, 17 Ala. 623. The court erred in refusing the right to defendant's counsel to present their evidence in the order they desired. *Byrd v. State*, 1 How. (Miss.) 250; *McCurdy v. Terry*, 33 Ga. 55; *Palmer v. McCafferty*, 15 Cal. 335; *Tinnin v. Garrett*, 4 S. & M. 208; *Carter v. Carter*, 9 Gill & J.; *State v. Fulkerson*, 10 Mo. 681. The trial court should have instructed the jury as to manslaughter. There was evidence tending to prove a lower grade of manslaughter. *State v. Banks*, 73 Mo. 592; R. S., §§ 1244, 1250; Wharton on Homicide, (2 Ed.) §§ 4, 5; *State v. Branstetter*, 65 Mo. 149; *Crawford v. State*, 12 Ga. 142; *State v. Bryant*, 55 Mo. 79; *State v. Mathews*, 20 Mo. 57; *Scott v. State*, 10 Tex. App. 113; 7 Tex. App. 464, 305. The judgment should be reversed for the improper remarks

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of the prosecuting attorney. *State v. Mahly*, 68 Mo. 314; *State v. Cooper*, 71 Mo. 443; *State v. Kring*, 64 Mo. 595; *State v. Lee*, 66 Mo. 167.

D. H. McIntyre, Attorney General, for the State.

The indictment is sufficient. The objection to the averments as to the location of the wound, is not well taken. *State v. Edmundson*, 64 Mo. 398; R. S., § 1821. The testimony of the witness Lance that defendant struck at him was admissible, because part of the *res gestae*. *State v. Testerman*, 68 Mo. 415; *McKee v. People*, 36 N. Y. 113. It was not error to refuse to allow the witness Gillies to state whether defendant was drunk or sober at the time of the difficulty. *State v. Edwards*, 71 Mo. 312; *State v. Hundley*, 46 Mo. 416; *State v. Dearing*, 65 Mo. 530. The evidence that deceased, while standing by the mill-hopper, after the first assault and before the fatal encounter, "looked scared and as if he wanted to get away," was proper. Wharton Crim. Ev., (8 Ed.) § 751. If it was error for the court to refuse to allow defendant to read the affidavit for continuance until the last, it was an immaterial error. He had the benefit of it in evidence, except as to the witness Edwards, who was in court and could have been sworn. The bare inspection of the record is sufficient to show that an instruction for manslaughter should not have been given. If the evidence for the prosecution is to be believed, defendant provoked the difficulty and took advantage of it to slay his victim, and was guilty of murder. If defendant's testimony is true, he acted solely in self-defense, and was guilty of no crime. The court instructed the jury fully and favorably to defendant upon the law of murder and self-defense. Defendant does not complain of the instructions given. The court properly instructed the jury that drunkenness was no excuse for the act, as has been attempted to be shown under the second head, and it was not improper for counsel to argue that phase of the case to the jury. It

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was true, as shown by the evidence, that defendant attempted to escape after the killing, and while the court gave no instruction upon the law as to presumptions arising from flight, or attempted flight, it was not error for the prosecuting counsel to tell the jury that it was an inference of guilt. It is true that such is the law, and it has not come to pass that the truth may be assigned as error. *State v. Emery*, 76 Mo. 348. If counsel misstated the evidence, as contended by defendant, the jury would have set the matter right, and it cannot be assigned as error.

NORTON, J.—The defendant was indicted for murder in the first degree at the September term, 1880, of the Stoddard county circuit court, and being put upon his trial at the September term, 1881, of said court was convicted of murder in the second degree, and brings the case before us on writ of error. The points made by counsel will be considered in the order made.

It is insisted that the indictment is insufficient in not locating the wound with certainty and because of repugnancy and inconsistency. Omitting the formal parts of the indictment it charges that: "Defendant him, the said Charles Flint, feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, did strike, stab and thrust in and upon the right side of him, the said Charles Flint, and also in and upon the back near the left shoulder of the body, giving to the said Charles Flint then and there, with the knife aforesaid, in and upon the right side, and also upon the back near the left shoulder of the body of him, the said Charles Flint, one mortal wound of the length of two inches, of the breadth of half an inch and of the depth of three inches," etc. The objection is not well taken, for under the ruling of this court in the case of *State v. Edmundson*, 64 Mo. 398, where the case of the *State v. Jones*, 20 Mo. 61, relied upon by defendant's counsel to sustain his objection, was considered, it was held that the case of the *State v. Dias*, 7 Blackf. 20 upon the au-

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thority of which the point in the case of the *State v. Jones*, *supra*, was decided had, in effect, been overruled in 10 Ind. 309, 359; 14 Ind. 441 and 22 Ind. 1.

It appears that one Lance, who saw the encounter between defendant and deceased, was introduced as a witness and stated among other things, that defendant call deceased a G—d liar, that deceased replied you are another, that they struck at each other and defendant fell, and on getting up drew a bottle of whisky and tried to strike witness who was trying to keep him quiet. Defendant objected to so much of said evidence as related to his attempt to strike witness, which was overruled. This objection was properly overruled, as it was part of the *res gestae*, and tended to show the *animus* of defendant. *State v. Testerman*, 68 Mo. 415.

It appears from the record that, after the first assault, deceased and defendant became separated, and deceased walked twenty or thirty feet away, and one of the witnesses was allowed to state, over defendant's objection, that deceased, while standing at the mill hopper and before the fatal encounter, "looked scared," "looked as if he wanted to get away." Under the authority of Wharton Cr. Ev., section 751, where it is said evidence that defendant was confused, embarrassed, or under the influence of terror is receivable, the trial court did not err in its ruling.

It is, also, objected that the court erred in refusing to allow a witness to state whether defendant was drunk or sober. Inasmuch as drunkenness neither extenuates nor excuses crime, the ruling of the court was proper. *State v. Hundley*, 46 Mo. 416; *State v. Dearing*, 65 Mo. 530; *State v. Edwards*, 71 Mo. 312.

It appears from the record that defendant's counsel, in stating his case to the jury, was proceeding to detail a difficulty which had occurred between a son of the deceased and the defendant, long previous to the homicide, and the court refused to allow him to proceed with the narrative, and this action of the court is assigned for error. The

matters referred to were not relevant to the issues, and evidence in regard to said difficulty would have been wholly inadmissible, had it been offered on the trial, and the action of the court in refusing to allow counsel to detail the transaction was not improper.

It, also, appears that defendant filed an application for a continuance on account of the absence of material witnesses, in which he set forth what he expected to prove by each of said witnesses, that the prosecuting attorney admitted that the witnesses named in the affidavit, if present, would testify as therein stated, and agreed that such statement should be received and admitted as their evidence upon the trial. On the trial, defendant read to the jury the statement of each of said absent witnesses, except the statement of one Edwards, which the court refused to permit him to read on the ground that said Edwards was present during the trial, and defendant could have had him sworn as a witness. It does not appear from the record before us, that this action of the court was excepted to at the time, and it is not, therefore, subject to review.

It is, also, objected that the court should have instructed the jury defining manslaughter in some of its degrees. The evidence on the part of the State tended to establish that the difficulty which resulted in the death of Flint was sought for and brought on by defendant, and that after having provoked he took advantage of it and fatally stabbed the deceased. On the other hand, the evidence on the part of defendant tended to establish that the killing was done in self defense. If the jury believed the evidence on the part of the State, the defendant was guilty of murder; if, on the contrary, they believe the evidence of defendant, he was guilty of no offence but was justifiable in killing deceased. The jury was instructed in regard to murder in the first and second degrees, as well as in regard to the law of self-defense, justifiable and excusable homicide.

No exception was taken to the instructions, in the court below, nor is any presented here.

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The prosecuting attorney, in his closing argument, referred to the flight of defendant as evidence of guilt; also stated that voluntary drunkenness was no excuse for crime, and should not be considered by the jury, and, also, that the "blood on defendant was the blood of his murdered victim, Flint." It is insisted that the judgment should be reversed because said remarks were not justified by the evidence. As to the flight of defendant, the record shows that after he had stabbed Flint and he had fallen dead, "that Ramsey, Russell and Garland rushed out of the mill to the wagon, got Ramsey in it, and started off as fast as they could," so that his flight was a proper subject of remark, as well as whether the blood on Ramsey was or not the blood of deceased, it appearing from the evidence that when Flint was stabbed both Ramsey and Flint were on the floor of the mill and Ramsey was taken off of deceased upon his exclaiming "take him off he has cut me all to pieces."

We find nothing in the record authorizing us to interfere with the judgment, and it is hereby affirmed. All concur.

LORD V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY, *Appellant*.

Negligence: RAILROADS: KILLING STOCK. In an action against a railroad for negligently running its train against and killing a cow, where the plaintiff only shows the injury and the passing of the train at a rate of twenty or twenty-five miles an hour along the place of the accident, which was over a tract of land inside of a village, midway between public thoroughfares 900 feet apart, he fails to make a case, and a demurrer to the evidence should be sustained.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN,
Judge.

REVERSED.

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M. A. Low for appellant.

The mere fact that a passenger train was run through the outskirts of a town, at a point where even the streets were 900 feet apart, and where, so far as the evidence shows, there were neither houses nor people, is not, of itself, negligence, or evidence from which negligence may be inferred. Aside from statutory or municipal regulation, no rate of speed is negligent *per se*. *Powell v. Railway Co.*, 76 Mo. 80; *Maher v. Railroad Co.*, 64 Mo. 267; *Bell v. Railroad Co.*, 72 Mo. 50, 61; *Wallace v. Railway Co.*, 74 Mo. 594; *Goodwin v. Railway Co.*, 75 Mo. 73. The rate of speed not being of itself negligent, and there being no other fact or circumstance tending to make it negligent, the court erred in refusing to declare, as a matter of law, that the defendant was not liable. There was no evidence tending to show when or how the cow went upon the track, or that defendant's employes saw, or could have seen it in time to save it; or that if they had been running slower they might have seen the cow in time to save it. *Wallace v. Railway Co.*, 74 Mo. 597. Even though the speed of the train was in itself negligent, still there was no evidence that it caused the injury. There was no necessary connection between the rate of speed and the injury to the cow. *Powell v. Railway Co.*, 76 Mo. 82.

H. C. Hughes for respondent.

The fact that defendant's train was running at a wanton and reckless rate of speed, in conjunction with the fact, so far as we know from the evidence, that it was through a populous portion of the city, and after dark, shows a reckless disregard of life in general, and constitutes negligence. *Isabel v. Railroad Co.*, 60 Mo. 482. There is sufficient connection between the negligence and the injury to the cow. One of the chief grounds of evidence is the known and experienced connection between collateral facts and circum-

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stances satisfactorily proved, and the fact in controversy. Greenleaf's Ev., (6 Ed.) p. 17, § 13. Common experience goes far to show that the injury is the almost necessary consequence of the collateral facts proved and necessarily inferred.

PHILIPS, C.—This action was begun in a justice's court, in Clinton county, based on the following statement:

"Plaintiff states that on or about the 5th day of December, 1880, defendant did, in Lathrop township, in the county of Clinton, State of Missouri, by its agents, and engines and cars, negligently strike, beat, bruise, wound and kill one four-year-old cow, the same being the property of plaintiff, and reasonably worth the sum of \$35, for which he asks judgment, with his costs in this suit expended." Judgment for plaintiff, from which the defendant appealed to the circuit court, with a like result. From that judgment he prosecutes this appeal.

On the trial of said cause, the plaintiff, to sustain the issues upon his part, offered evidence tending to prove that his cow, of the value of \$35.00, was struck and killed in the village of Lathrop, and about 150 yards south of the north line of the section upon which said town is located, by a passenger train of the defendant, going north, after dark, on the evening of September 5th, 1880; that on the north line of Lathrop, about 150 yards north of where his said cow was struck and killed, there was a public crossing, and there was also another public crossing, about 150 yards south of where said cow was killed. Plaintiff against the objection of defendant, introduced evidence tending to show that the train in question did not stop at the station at Lathrop, but passed through at the rate of twenty or twenty-five miles an hour. This was all the evidence. Whereupon the defendant demurred to the evidence, which the court overruled, and the court, sitting as a jury, found the issues for the plaintiff and entered up judgment accordingly.

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There was not evidence to support this verdict, and the court should have sustained the demurrer to the evidence. Neither the law of the land, nor the general statutes prescribe any rate of speed at which a railroad may run over its own right of way. The law exacts of those in charge of the trains running through towns and populous districts a greater degree of caution and circumspection than through the country, and this because of the greater peril to life and limb, both of the passengers entrusted to their safety and to the people presumably frequenting the passways over a railroad running through a town or city. But "the rule is that the company shall fix its own rate of speed as regards others than passengers, and the above are exceptional cases, each standing upon legislative enactment, or its own peculiar circumstances." *Maher v. Railroad Co.*, 64 Mo. 276. No rate of speed is *per se* negligence, in the absence of statutory or municipal regulation. *Sherm. & Red. Neg.* 478; *Goodwin v. Railroad Co.*, 75 Mo. 73; *Wallace v. Railroad Co.*, 74 Mo. 594; *Bell v. Railroad Co.*, 72 Mo. 50, 61; *Powell v. Railroad Co.*, 76 Mo. 80.

There was no necessary connection between the fact proved and the injury sought to be attributed thereto. There was no evidence that cattle were in the habit of frequenting this district of country, or that the servants of the railroad company knew of any such fact, if it did exist. There was no evidence that those in charge of the train saw the cow before or after she was killed, or that they might, with the exercise of due care, have seen her in time to prevent the injury. In short there was nothing shown by the plaintiff, save the injury and the passing of the train at the rate of twenty or twenty-five miles an hour, over a tract of land inside of a village midway, between public thoroughfares 900 feet apart.

There is no authority to support such a verdict, and it was the duty of the trial court to have so told the jury.

The judgment of the circuit court is, therefore, reversed and the cause remanded. All concur, except NORTON and SHERWOOD, JJ., absent.

GIBBS, *Administrator, Appellant*, v. THE CITY OF HANNIBAL.

1. **Damages, who may sue for.** The only persons who are authorized to sue for the damages allowed by Revised Statutes 1879, sections 2121, 2122, 2123, (Wag. Stat., pp. 519, 520, §§ 2, 3, 4,) are the husband or wife or minor children, or the father and mother, or either of them where the other is dead, in case the deceased be an unmarried minor. Where all these beneficiaries perish in the same disaster, there is no person left to whom the action survives.
2. **Damages: PROPERTY.** Revised Statutes 1879, sections 2121, 2122, 2123, have no reference to injuries or damages to the property of the deceased.

Appeal from Ralls Circuit Court.—HON. JOHN T. REDD,
Judge.

AFFIRMED.

Thomas H. Bacon for appellant.

(1) The Missouri statute of survivorship of actions, and the damage act of Missouri were imported from New York. *Nagel v. Murdock*, 75 Mo. 666. (2) The widow's cause of action is not for a personal tort. *Quinn v. Moore*, 15 N. Y. 432. It will survive her and she can assign the claim. *Byxhie v. Wood*, 24 N. Y. 606. The action appeals to no common law right, and rests upon no common law principle. *Whitford v. Panama*, 23 N. Y. 465. The damage act makes the life of the deceased statutory property. *Yertore v. Wiswall*, 16 How. (N. Y.) 12, 13. Compare *Stafford v. Drew*, 3 Duer 627. (3) The gravamen of the action for the husband's death is the injury to his person, for which

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he might, while living, recover damages. *Proctor v. Railroad Co.*, 64 Mo. 112; *White v. Maxey*, 64 Mo. 552; *Elliott v. St. Louis*, 67 Mo. 272. This cause of action, outliving the husband, becomes *eo instanti* vested in the widow, by whose death it never could and never did abate. *Cowen v. Moore*, 31 Mo. 574; *Kennedy v. Burrier*, 36 Mo. 130; Sedgwick on Dam., (6 Ed.) p. 698; *Railroad Co. v. Barron*, 5 Wall. 90; *Doedt v. Wiswall*, 15 How. Pr. 128. (4) The cause of action under section 3 of the damage act is not elemental but composite, and one of its factors is "the necessary injury resulting from the death," and such injury may be to proprietary rights so as to cause pecuniary damage. *Owen v. Brockschmidt*, 54 Mo. 285; *Murphy v. New York*, 88 N. Y. 445. And the jury may look at matters of aggravation, if any such there be. *Morgan v. Durfee*, 69 Mo. 418; *Joice v. Branson*, 73 Mo. 29; *Nagel v. Missouri, etc.*, 75 Mo. 666. And causes of action for such injuries to proprietary rights survive to the administrator. Wag. Stat., p. 87, §§ 29, 30. (5) The pecuniary impairment of a widowed mother's estate by the funeral expenses, (*Pack v. Morgan*, 3 Comst. (N. Y.) 489,) of her child killed by another's negligence, did always create, under the territorial law of 1816, (1 Terr. Laws, 436; Wag. Stat. 1872, p. 886, § 1,) importing English statutes (4 Edw'd III, C. 7) and decisions up to 1607, (Owen 99, Latch 167, 168,) a cause of action surviving to the administrator, (*Chamberlain v. Williamson*, 2 M. & Sel. 408, 416,) and if under the damage act of 1855, (R. C. 1855, p. 648; Wag. Stat. 1872, p. 520,) a cause of action therefor cannot be shown, the averment of such special and pecuniary damage to estate is nevertheless good as the gravamen of a suit by the administrator for such special damage, including matters in aggravation maintainable under either the said enactment importing the English statutes and construction, (Wag. Stat. 1872, p. 886, § 1,) or the survivorship statute of 1835, (R. C. 1835, p. 48, § 24; Wag. Stat. 1872, p. 87, § 29,) and if under the circumstances a cause of action cannot exist in the administrator

by virtue of the posthumous damage act, the petition is good as showing a cause of action under the general law, (*Comings v. Hannibal*, 49 Mo. 512, p. 517; *Garner v. Hannibal*, 34 Mo. 235, p. 240; *Atlantic v. Freeman*, 61 Mo. 80; *Hewitt v. Harvey*, 46 Mo. 368; *Northcraft v. Martin*, 28 Mo. 469; *Easley v. Prewitt*, 37 Mo. 361,) that is to say it is "such action," (Wag. Stat. 1872, p. 87, § 29,) as might "be brought by the person injured" (*Ib.*) "for wrongs done to the property, rights or interest of" (*Ib.*) herself. (6) As to the person injured, the cases of instantaneous death are within the statute perpetuating the cause of action. Shearman & Redfield on Neg., (3 Ed.) p. 368, § 300. (7) The question of survivorship in case of loss of life by common calamity, does not arise on the record as the averments establish an interval of time between the deaths of the husband and children on the one hand, and the death of the widow on the other hand. But survivorship without appreciable interval is recognized by the civil law, (Kent Com., (11 Ed.) vol. 2, pt. 5; Lect. 37, p. 563, side 535,) and the colonial civil law of Missouri has not been abrogated. (*Moreau v. Detchemendy*, 18 Mo. 522.) The common law, so far as it existed, was simply made paramount; and as on such subject the common law is silent, the colonial civil law prevails. (*Lindell v. McNair*, 4 Mo. 380, pp. 383, 384. Compare *Miller v. Dunn*, 216, p. 220.) And such law is the subject of judicial notice. *Ott v. Soulard*, 7 Mo. 573; *Chouteau v. Pierre*, 9 Mo. 3. The widow's interest was property, (Wag. Stat. 1872, p. 888, § 6, last clause,) and, therefore, it survived.

W. C. Foreman, B. F. McPherson and W. H. Russell,
City Attorney, for respondent.

(1) The petition is not good under the damage act, under which it was evidently brought, the beneficiaries being specially mentioned in the act, who alone are authorized to sue. R. S. 1879, §§ 2121, 2122, 2123. (2) The whole family, constituting all the beneficiaries under the

act, having perished together, no action can be maintained for want of a beneficiary. Cooley on Torts, (1 Ed.) 267, 269. (3) In actions under this act where the petition shows at most only nominal damages, it will not be sustained, it only being intended to benefit actual sufferers. Cooley on Torts, (1 Ed.) p. 270. The petition in this case cannot be sustained under section 96, chapter 5, Revised Statutes, because: 1st, All actions for damages growing out of death by negligence, must be brought under the damage act, which was passed long subsequent to said section, and which specifically points out the beneficiaries and confers upon them alone the right to sue; 2nd, So far as rights of action growing out of loss sustained by death caused by negligence, the section is only declarative of the common law, at which no action could be sustained where the death is instantaneous. Cooley on Torts, pp. 262, 263; 3rd, The petition does not specifically declare upon any loss of service or wages, or lessening of personal property of plaintiff's intestate, which is necessary under the section, and without averring which it is bad. Addison on Torts, (4 Eng. Ed.) p. 1090; *James v. Christy*, 18 Mo. 162; *Higgins v. Breen*, 9 Mo. 497. The special damages set up in the petition did not occur during the life of plaintiff's intestate, and are not even specious. (4) The plaintiff's intestate outside of the provisions of the damage act, could have no right of action for loss of service or *solatium* of husband and children. Schouler on Dom. Rel., (1 Ed.) pp. 110, 348; 2 Kent Com., p. 182; 1 Bl. Com., p. 453. The death of husband and children being instantaneous, no right of action at common law could arise. Cooley on Torts, pp. 262, 263. (5) Plaintiff's intestate's death followed immediately after that of her husband and children, no loss could occur to her under said section 96. *James v. Christy*, 18 Mo. 162.

RAY, J.—On June 27th, 1877, George L. Crosby with his wife and their two infant children, in a vehicle crossing a bridge over a stream on a public street in the city of

Hannibal, was precipitated into the stream by a fall of the bridge, alleged to have been caused by the negligence of the defendant. By reason of this casualty the family perished. It is sought to be alleged that Mrs. Crosby survived her husband and two children, and that while so surviving a cause of action vested in her for the death of her husband, and that a cause of action vested in her for the death of each of her said two children. On December, 24th, 1877, her administrator, this plaintiff, sued defendant on each of said three causes of action. There are three counts. The first for the death of the husband, George L. Crosby; the second for the death of the female child, Mattie Q. M. Crosby, and the third for the death of the male child, Ray Crosby. The action was brought in the Hannibal court of common pleas. A change of venue was then taken to the Ralls circuit court, where the case was tried.

It is not necessary, we think, to set out the amended petition, which is very lengthy, in order to present what we regard as the controlling questions in the case. The suit is brought by the administrator of the wife to recover for the death of her husband and two minor children, and, also, for special damages to property, and burial expenses alleged as resulting therefrom, occasioned by the wrongful act, neglect and default of the city of Hannibal in negligently constructing and maintaining a bridge over a certain water course in said city. The defendant filed a general demurrer to the petition for the reason that it did not state facts sufficient to constitute a cause of action which was sustained by the circuit court and upon refusal of plaintiff to amend judgment was entered thereon for the defendant, and the case appealed to this court. The propriety of this ruling is the only question before us.

The petition, we take it by any fair construction, is based upon sections 2121, 2122 and 2123 of the revision of 1879, or, as it is popularly called, the damage act. The two leading questions presented by the demurrer are first: The right of the plaintiff to maintain the action. Second,

the right in this action to recover for damages to property alleged to have been occasioned by the falling of the bridge, and the death of the husband consequent thereon. In the case of *Proctor v. H. & St. J. R. R. Co.*, 64 Mo. pp. 119, 120, this court speaking of sections 2, 3 and 4 as then numbered in the damage act, 1 Wag. Stat., pp. 519, 520, and, which correspond with sections 2121, 2122 and 2123 of the revision of 1879, uses this language; "It is conceded by all that the third section of the act was only designed to transmit a right of action, which but for the section would have ceased to exist, or would have died with the person; in other words, that under section three whenever a person dies from such wrongful act of another as would have entitled the person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed, and the amount of damages to be recovered. Section 4 provides that all damages accruing under section 3 shall be recovered by the same parties, and in the same manner as is provided in section 2, and in every such action the jury may give damages not exceeding \$5,000. This section in connection with section 2 designates the parties to whom this right is transmitted, and also the time within which it is to be exercised."

In *McNamara v. Slavens*, 76 Mo. 330, 331, this court treating of the same subject uses this language: "Neither the husband, nor wife, nor children, had at common law, an action for the death of the husband, or wife, or parent, under the circumstances mentioned in sections 2121, 2122. It is a cause of action created by the statute, and no one can sue unless he bring himself within its terms." Section 2123 provides that all damages accruing under section 2122

shall be sued for and recovered by the parties named in section 2121, that is, first by the husband or wife of the deceased, or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead then by the survivor. These are the only beneficiaries who can maintain such an action. If in any case there be no such person, no suit can be brought by any other person. By the statute the action survives only to the parties named. They alone are the beneficiaries of the statute and it was never intended that such action should survive to the executor or administrator of any one of the beneficiaries named. It is a right personal to the beneficiary, and does not survive to his personal representatives. In the case at bar all the beneficiaries within the purview of the statute perished together in one common disaster and there was no person left to whom the action could survive. It follows that this action cannot be maintained by the present plaintiff who is the administrator of the wife. Under the statute he has no standing in court.

As to the other question, we think it quite manifest that the damage act, or sections 2122, 2123, *supra*, have no reference to injuries or damages to property of the deceased, but only to personal injuries and such as the injured party, if living, might have recovered and such as the jury may deem fair and just with reference to the injury necessarily resulting to such survivor from such death. Injury or damage to property, as such, is not within the contemplation of the damage act and, consequently, no recovery can be had in such an action for such injury or damage. Section 96 of the administration law has reference exclusively to wrongs done to the property rights or interest of another and by section 97 of same law do not extend to actions for slander, libel, assault and battery, or

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false imprisonment, nor to actions on the case for injuries done to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. If any injury or damage was occasioned to the property of the husband in this case by the fall of the bridge occasioned by the negligence of the defendant corporation, the action therefor, if any, by operation of section 96 of the administration law, *supra*, survived to the administrator of the husband, if to anybody, and not to that of the wife. Such is the express import of section 96, *supra*. That section does not contemplate the injuries and damages, or the actions provided for by the damage act.

The latter survives by special statute, contrary to the common law and only to the parties or beneficiaries named in the special statute. Various other questions have been discussed and numerous cases cited, but we deem them unnecessary to the disposition of the case.

It follows, therefore, that there was no error in the ruling of the circuit court in sustaining the demurrer of defendant, and its judgment is, therefore, affirmed. All concur.

DILLON *et al.* v. HUNT, *Appellant.*

1. **Negligence:** REMOVING WALLS OF HOUSE: PETITION, SUFFICIENCY OF. A petition in an action for damages caused by the falling of the walls of defendant's house, left standing after a fire, on the adjoining one of plaintiff, is good on demurrer, which charges the ownership and possession and control of the falling house to be in defendant, his knowledge of its condition, that he permitted and allowed certain persons to enter upon the premises for the purpose of removing the walls and chimneys and abating said nuisance, that said persons tore down said walls, and in doing so negligently and unskillfully pushed, or threw, or caused the same to fall over and upon said house occupied by the plaintiff, thereby causing the damage.

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2. **Petition:** INFERENCE FROM FACTS ALLEGED. The existence of the relation of master and servant between defendant and the persons who were taking down the walls is inferable from the allegations of the petition.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Noble & Orrick for appellant.

1. The rule of construction applicable to this petition is, that its averments are to be taken most strongly against the plaintiffs, and, in matters of doubt, they are to be resolved in favor of the defendant. 2. The petition does not aver that the parties causing the injury to the plaintiffs were the servants of the defendant, but, on the contrary, that they were acting for themselves, and that the defendant was not their superior. 3. To have made the petition a good petition, it should have shown distinctly, by direct averments, that the persons who caused the injury were acting under the employment of the defendant. This it not only does not do, but avers in effect the contrary. 4. The case as stated falls within the rule that the owner is not responsible for damages done on or by use of real estate, when the relation of master and servant does not exist between him and the person causing the injury. *Berry v. St. Louis*, 17 Mo. 125; *Morgan v. Bowman*, 22 Mo. 546; *Clark v. Railroad Co.*, 36 Mo. 228; Wharton on Neg., § 818; Thompson on Neg., §§ 914, 915. 5. The petition exhibits on its face a case of negligence by the plaintiffs, and they cannot recover in any event. *Crawshaw v. Sumner*, 56 Mo. 517.

C. P. & J. D. Johnson for respondents.

The petition, in substance, charges that the appellant was the owner and in possession of certain fixed property in the city of St. Louis, and that he knowingly permitted

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others, not his contractors, to use it in a manner to work an injury to the adjoining property of respondent. Respondents contend that, under the facts stated in the petition, the law made it the duty of the appellant to so use and manage the property in question that injury would not result to the rights or property of others, and that, failing in this duty, the law holds him accountable for the injuries resulting therefrom. See *Althorf v. Wolfe*, 22 N. Y. 359; *Vincett v. Cook*, 11 N. Y. Sup. Ct. (4 Hun.) 318; *Benson v. Saurez*, 43 Barb. 408; *Gorham v. Gross*, 125 Mass. 237, and cases cited; *Dorritz v. Rapp*, 72 N. Y. 307; 1 Thompson on Neg., p. 278; *Robbins v. Chicago*, 5 Wall. 667, 678; *Chicago v. Robbins*, 2 Black. 418, 428; *Tarry v. Ashton*, 1 Q. B. Div. 319; *Pickard v. Smith*, 10 C. B. (N. S.) 472; *Fletcher v. Ryland*, L. R. 1 Ex. 280; *Hole v. Sittingbourne*, 6 H. & N. 488, 500; *Butler v. Hunter*, 7 H. & N. 826, 833; *Chauntler v. Robinson*, 4 Exch. 163, 170; *Bower v. Peatec*, 1 Q. B. Div. 321; Charter of the City of St. Louis, Appendix, 2; R. S. of Mo., p. 1588, § 26 subd. 12; Rev. Ordinances of the City of St. Louis, 1881, p. 399, § 32. The respondents' right of action is based upon the maxim of *sic utere tuo ut alienum non laedas*. As it does not appear from the petition that the parties who tore down appellant's walls were his contractors for doing the work, the rule of *respondant superior* is not involved in the consideration of the case. *Althorf v. Wolfe*, 22 N. Y. 359; *Gray v. Boston*, 114 Mass. 153; *Vincett v. Cook*, 11 N. Y., Sup. Ct. (4 Hun.) 318; *Benson v. Saurez*, 43 Barb. 408; *Robbins v. Chicago*, 5 Wall. 667; *Gorham v. Gross*, 125 Mass. 237. The charter and ordinances of the city of St. Louis also imposed on appellant the duty of removing the walls from the premises without injury to others. City Charter, 2 R. S. 1879, p. 1588, § 26; Rev. Ordinances, 1881, p. 399, § 32; *Dorritz v. Rapp*, 72 N. Y. 307.

EWING, C.—Plaintiff had a store on Fourth street in St. Louis, and the defendant owned the adjoining house

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which was accidentally burned. Plaintiffs sued defendant, and after making other necessary averments proceed as follows:

“Plaintiffs further state that on or about the 14th day of November, 1877, the interior and combustible portions of said building owned by defendant, as aforesaid, were destroyed by fire, and certain interior and exterior brick walls and chimneys were left standing; that from the time of said fire until the 17th day of November, 1877, said walls and chimneys were, as the defendant then and there well knew, in an unsafe, insecure and dangerous condition and were a nuisance, and liable at any time to fall over and upon adjoining premises and cause injury to the persons and property of others; that the defendant was then and there in possession of said premises and the said walls and chimneys situated thereon, and had full and exclusive control and direction thereof; that on or about the 17th day of November, 1877, said defendant allowed and permitted certain persons to enter upon said premises for the purpose of removing said walls and chimneys and abating said nuisance; and said persons tore down said walls, and in so doing negligently and unskillfully pushed or threw or caused the same or portions thereof to fall over and upon the said house occupied by said plaintiffs as aforesaid, thereby crushing and destroying said house, and covering the said chattels contained therein with the debris thereof and of the said walls and chimneys, and that their act injured to his benefit; and that it was the duty of said defendant to abate said nuisance and remove said walls and chimneys in a proper manner and without detriment to another. And plaintiffs aver that said defendant either knew, or had good reason to know, that said persons who undertook to tear down said walls intended to adopt, and did adopt, an improper, unsafe and dangerous method of removing and tearing down the same, and nevertheless, said defendant wholly neglected his duty as the owner of said premises, as aforesaid, knowingly permitted said work to be proceeded with,

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with the result aforesaid." And then closing with an appropriate statement of, and prayer for damages.

Defendant demurred, on the ground that the petition did not state facts sufficient to constitute a cause of action, which was sustained.

The plaintiff declining to plead further there was judgment on the demurrer for the defendant, whereupon the plaintiff appealed to the St. Louis court of appeals. That court reversed the judgment of the circuit court and the defendant is the appellant here.

The sole question is the sufficiency of the petition. The cause of action, if stated at all, must be substantially in that clause which says "said defendant allowed and permitted certain persons to enter upon said premises, for the purpose of removing said walls and chimneys and for the purpose of abating said nuisance, and said persons tore down said walls; and in so doing negligently and unskillfully," etc. The petition does not allege plainly that the "persons" referred to were the agents and servants of the defendant, so as to clearly bring the defendant within the rule of *respondeat superior*. Nor does it go far enough to charge that the "persons" who negligently and unskillfully pulled down the wall were employed by the defendant as contractors. It seems to be an effort to state a cause of action as an exception to the broad rule well established in this State by the leading case of *Barry v. City of St. Louis*, 17 Mo. 121, and followed afterwards in *Morgan v. Bowman*, 22 Mo. 538, and *Clark v. H. & St. J. R. R. Co.*, 36 Mo. 205.

In *Barry v. City of St. Louis*, the proposition is laid down that "one person is not liable for the acts or negligence of another, unless the relation of master and servant exist between them; and when an injury is done by a party exercising an independent employment, the person employing him is not liable. The only inquiry is, as to the relation between the parties. When that is decided the question is solved.

In that case the city of St. Louis contracted with

Peter Brooks for the construction of a sewer. The general right of the city engineer to inspect the work was reserved in the contract. In the progress of the work a deep trench was cut; and Barry whilst lawfully going along the street, without negligence on his part, fell into the ditch and broke his leg, because of the negligence of the defendant (the city) in not furnishing lights, or other warnings, of the exposed condition of the street. It was held that the city was not liable.

The pleader seems to have been endeavoring to state a case within the rule, now well established, that when the owner of land undertakes to do a work, which in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor, exercising an independent employment, and employing his own servants. But when the work is not in itself necessarily a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as contractor. Wharton on Negligence, § 818, and authorities there cited. The petition does not come within this rule for the reason that taking down brick walls and chimneys is not necessarily a nuisance.

Yet, I think there is no doubt but that the petition is good on demurrer. It charges the ownership and present possession and control of the house; knowledge of its condition in the defendant; that he permitted and allowed certain persons to enter upon the premises, for the purpose of removing said walls and chimneys and abating said nuisance; that said persons tore down said walls, and in doing so, negligently and unskilfully pushed, or threw or caused the same to fall over and upon said house occupied by plaintiff, and thereby caused the damage.

If these allegations be true, the inference would be that the relation of master and servant existed between defendant and the persons who committed the injury. It is

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alleged that the work was being done on his property, of which he had possession and control, with his consent for his benefit, and in an unskillful manner. Hence he is called upon to plead facts, which will excuse or relieve him from the consequences of these allegations, if true.

The judgment of the court of appeals is affirmed. All concur, except NORTON and SHERWOOD, JJ., absent.

GILL *et al.* v. FERRIS, *Appellant.*

1. **Contract in Restraint of Trade, Violation of:** INJUNCTION. A contract not to engage in a particular kind of business, at a specified place for a limited time, is not invalid as being in restraint of trade, and injunction lies to restrain its violation.
2. **Partner, when not.** One who receives a third of the profits of a firm as compensation for his services, and who is not liable for any of its losses, is not a partner.
3. **Partnership: CHANGE OF NAME.** The rights and liabilities of a partnership, as a rule, are not affected by a change in its name, unaccompanied by a change in its members.
4. **Injunction: MISJOINDER OF PLAINTIFFS.** A misjoinder of plaintiffs in an injunction suit, is not a ground for dissolving the injunction.

Appeal from Audrain Circuit Court.—HON. ELIJAH ROBINSON, Judge.

AFFIRMED.

Gilliam & Ferriss and *W. H. H. Russell* for appellant.

The court should have sustained the motion to dissolve the injunction. *Mortland v. Holton*, 44 Mo. 58. Where several join in a bill, if either is not entitled to relief, the bill must be dismissed as to all. *Jones v. Quinnipiack Bk*, 29 Conn. 25; *Hudson v. Madison*, 12 Sun. 416; High on Injunc., § 1613. Allowance of demurrer to the whole

bill puts an end to injunction obtained. No suit was maintainable on the second count of the petition. The court erred in permitting any testimony on the bill. The court erred in finding for plaintiffs and in decreeing the injunction. Courts of equity will not enforce specific performance by injunction when the relations of the parties are so changed that it will be an unreasonable hardship on the defendant. *Duke of Bedford v. Trustees*, 2 My. & K. 552; *Davis v. Hove*, 2 Sch. & Lef. 341; *City v. Nash*, 3 Atk. 512; Pomeroy on Specific Perform., 258, 262, 263, 265. Plaintiffs allege they are prosecuting business as Gill & Garrett. They must allege they are prosecuting it as T. M. Gill & Co. *Berger v. Armstrong*, 41 Iowa 447. Good will expires with the firm, and the firm expires by dissolution or taking in a new partner. *Mudd v. Bart*, 34 Mo. 465; *Spaunhorst v. Link*, 46 Mo. 197; Collyer on Part., 163. The contract of 1874 was with the distinct legal entity, T. M. Gill & Co., and was a personal contract with that legal entity and not assignable. *Stevens v. Benning*, 6 DeG. M. & G. 223; *Boykin v. Campbell*, 9 Mo. App. 495; *Robson v. Drummond*, 2 Barn. & Adol. 303; *Leahy v. Dugdale*, 27 Mo. 439; *Davis v. Coburn*, 8 Mass. 299; *Hall v. Gardner*, 1 Mass. 172; *Hurd v. Curtis*, 19 Pick. 459; *Emerson v. Bayliss*, 19 Pick 55; *Lansden v. McCarthy*, 45 Mo. 106. "Where a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will not of his own mere motion do anything to put an end to that state of circumstances under which alone the agreement can be operative. 1 Addison Cont., § 236; 1 Chitty Cont., p. 89; *Stirling v. Maitland*, 5 Best & Smith 840; *St. Louis & Denver L. & M. Co. v. Tierney*, 5 Colo. 582. The plaintiffs are estopped by their own declarations of dissolution. *Talcott v. Brackett*, 5 Brad. 60; *International B'k v. Bowen*, 80 Ill. 541; *Quirk v. Thomas*, 6 Mich. 76; *Dezell v. Odell*, 3 Hill 222; *Pilkington v. Ins. Co.*, 55 Mo. 172; *Chouteau v. Goddin*, 39 Mo. 229; *Garnhart v. Finney*, 40 Mo. 449; *Taylor v.*

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Zepp, 14 Mo. 282; *Newman v. Hook*, 37 Mo. 207. The laches of plaintiffs in standing by for so long a time, while defendant was incurring such large expense in advertising and investing such a large amount of money in his enterprise, is sufficient for a court of equity to refuse an injunction, even if they had a genuine cause of action. *State v. West*, 68 Mo. 232; *Butler v. Lawson*, 72 Mo. 227; *Landrum v. Union B'k*, 63 Mo. 48; *Moreman v. Talbot*, 55 Mo. 392; *Bradshaw v. Yates*, 67 Mo. 221; *Bliss v. Pritchard*, 67 Mo. 181. The injunction should not have been granted, because in the most favorable aspect for plaintiffs it was a case of doubtful equity; they showed no appreciable damage, and the injunction would necessarily work a great hardship to defendant without any corresponding benefit to plaintiffs. Story's Eq. Jur., § 959 b; High on Injunc., § 720; *Grey v. Railroad Co.*, 1 Grant 412; *Richards' Appeal*, 7 P. F. Smith 105; *Harkinson's Appeal*, 78 Pa. St. 204.

Macfarlane & Trimble and Forrist & Fry for respondents.

The amendment of the original bill leaving Garrett out was a proper one. R. S. § 3569; also *Ib.* 3565, *et seq.*; Hillard on Injunctions, 365; *Beard v. Dennis*, 6 Ind. 200. The contract was not within the statute of frauds, *Self v. Cordell*, 45 Mo. 345; *Lyon v. King*, 11 Met. 411; *Blonding v. Sargent*, 33 N. H. 239; *Blanchard v. Weeks*, 34 Vt. 589; *Hill v. Jameson*, 16 Ind. 125. The contract was reasonable and valid; it only bound the defendant to keep out of the business in Mexico, while plaintiffs were engaged in the same business there. 2 Parsons on Confs. 253, 260; *Billings v. Ames*, 32 Mo. 265; *Presberry v. Fisher*, 18 Mo. 50; *Long v. Lamb*, 42 Mo. 545; *Peltz v. Eichle*, 62 Mo. 171. The defendant was not released from his contract when the firm of T. M. Gill & Co., was changed to Gill & Garrett. Generally the rights and liabilities of a firm cannot be affected by a change of its name, unaccompanied by a

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change amongst its members. 1 Lindley on Part., p. 211. Garrett was not a partner in the business of Gill & Garrett. He received as compensation for his services, one-third of the net profits, and was to bear none of the losses; this did not constitute him a partner. *Cope v. Eyre*, 1 H. Black. 49; *Wiggins v. Graham*, 51 Mo. 17; *Campbell v. Dent*, 54 Mo. 325. That the introduction of a new member into a firm would work a dissolution of the partnership is not disputed, but that such dissolution would, necessarily, operate as a release of a third party from a contract made with the old firm does not follow. Ordinarily such a contract as this is assignable and passes with a transfer of the business and especially would that be the case if one of the original parties to the contract continued in the business. *Peltz v. Eichle*, 62 Mo. 171; *Bryant v. Davis*, 6 Ind. 200; *Morgan v. Perhamus*, 36 O. St. 517; *Guerand v. Daudelet*, 32 Md. 561. If defendant sold to plaintiffs as a part of his assets the good will of the business, then all controversy ends. Good will may be sold like other personal property. *Chen-ton v. Douglass*, Johns, Ch. 174; *Crutwell v. L'ze*, 17 Ves. 335; *Mussulman's Appeal*, 62 Penn. St. 81; 14 Am. Law Reg., 328 and authorities cited. When a partnership is dissolved by death or bankruptcy of a partner, the good will should be sold as an asset of the firm and the proceeds distributed among the partners. *Crawshay v. Collins*, 15 Ves. 218; *Willett v. Blankford*, 1 Hare, 253; *Brodberry v. Dickens*, 27 Beav. 53; 14 Am. Law Reg. 334 *et seq.* When a partner sells out all his share in a going business it will be presumed that such sale includes the good will. 14 Am. Law Reg. 649 and authorities cited. Contracts like the one in suit should receive a liberal construction, so as to carry out the evident intention of the parties as in case of other contracts. *Wiggins Ferry v. Railroad Co.* 73 Mo. 389.

NORTON, J.—On the 24th of June, 1881, the plaintiffs, Thomas M. Gill and Richard W. Gill, filed in the circuit

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court of Audrain county their second amended petition sworn to by T. M. Gill, containing two counts, the first of which is as follows: That prior to March 4th, 1874, they were residents of St. Louis, Mo., and defendant, George D. Ferris, was a resident of Mexico, Mo., engaged in the sale of hardware, cutlery, hollow-ware, stoves, manufacturing tinware, selling wagons and agricultural implement business; that defendant did a large business, and had a large and commanding influence throughout a large area of country surrounding said city of Mexico; and they allege his stock was not worth more than \$12,000, but that defendant wanted to sell it with the good will for \$15,000; that plaintiffs formed a co-partnership, consisting of Thomas M. and Richard W. Gill, under the firm name of T. M. Gill & Co., and bought out defendant for the sum of \$15,000, which they allege included his good will, and a memorandum of said agreement was made, as follows:

“MEXICO, March 4th, 1874.

Having this day sold to T. M. Gill & Co. (which firm is composed of Thomas M. Gill and Richard W. Gill), my entire stock of goods and merchandise contained in my four-story brick building and warehouses adjacent, which buildings were lately occupied by me, in consideration of the sum of \$15,000, payment of which is hereby acknowledged: Be it known, as a part of this contract, I have this day leased to said T. M. Gill & Co., for a term of three years, commencing from the 4th day of March, 1874, the said buildings, consisting of the four-story brick lately occupied by me, together with all warehouses adjacent, for the sum of \$600 per annum; and it is also agreed, that at the expiration of said three years, from March 4th, 1874, that the said T. M. Gill & Co. are to have a further lease of two years, commencing from March 4th, 1877, of said premises, at an annual rent to be fixed as to the amount thereof upon the basis of a fair estimate of the rent annual which said premises will bring, and which may be decided,

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if necessary, by referee, to be appointed by said T. M. Gill & Co. and myself. It is a part of this contract also that I agree not to engage in the same line of business I have been conducting heretofore in Mexico, Mo., either directly or indirectly, so long as T. M. Gill & Co. shall prosecute it there.

G. D. FERRIS."

And plaintiffs allege that by some mistake of the scrivener who wrote the same, the good will of said trade and business was omitted, and also the tools and implements, which said tools and implements were actually delivered at time of sale. That plaintiffs made large additions to their stock, and ran said business until the — day of —, 1879, when they took in with them one Garrett, a former salesman, and changed the firm name to Gill & Garrett, and which was done for plaintiffs convenience and that they might more successfully prosecute their business, and they are still doing business in that name, and that they, in 1879, bought and built, 300 feet from Ferris' building, another building at an expense of \$12,000, and moved into it and have been there ever since, which defendant well knew at the time.

That in the early spring of 1880 defendant and his son, as G. D. Ferris & Co., opened out in the store of Ferris (formerly occupied by T. M. Gill & Co., but vacated by them, they having removed into the new building), a large stock of hardware, agricultural implements, etc., being the same line as plaintiffs, in violation of contract aforesaid; that he extensively advertised his business in the newspapers and by handbills, etc.; allege that he has damaged plaintiffs \$5,000, and will destroy their business, and that they have no adequate remedy at law, and that, unless restrained, they will suffer great and remediless injury, and pray for injunction restraining him from, in any manner, prosecuting said business or any branch thereof, either in his own name or as G. D. Ferris & Co., or any other firm or

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name, or using his skill, knowledge, experience, or influence, or money, in any manner, at Mexico, or influencing or attempting to influence any person to trade with him, or from trading with plaintiffs, or from giving to said plaintiffs his or their custom or patronage, or from permitting his name to be used in any manner of sign or advertisement in said business, in Mexico, until further order of the court, and for an account to be taken of damages sustained by plaintiffs; that injunction be made perpetual, and for such other and further relief as they may be entitled to.

Second count. That about October 15th, 1879, plaintiffs had for a long time been engaged in hardware, agricultural implements, etc., business at Mexico, Mo., either under firm name of T. M. Gill & Co., or as Gill and Garrett; that Ferris, since 1874, had been in hardware business at Centralia, Mo., and had, upon his desiring* to return to Mexico, about \$100 worth of hardware, hollow ware, agricultural implements, etc., which he besought plaintiffs to buy at the sum of \$290, and proposed to them if they would buy at that price he would not engage in said hardware business in any of its branches while they were engaged in same at Mexico, and that these plaintiffs did buy the same at said price, in consideration of said promise, and these plaintiffs have ever since been engaged in said business in Mexico.

That defendant in fraud of plaintiffs' rights and in violation of said agreement, in the spring of 1880 engaged in hardware, agricultural implement, etc., business in Mexico with his son as G. D. Ferris & Co., and extensively advertised said business in newspapers, handbills, dodgers, etc., and has damaged plaintiffs \$5,000. Injunction against defendant doing business as hardware merchant at Mexico, Missouri, temporary and perpetual, account, etc., prayed as in first count.

Defendant filed his answer to said second amended petition, setting up the following defenses to said first count. Defendant denies that the stock of goods sold was ill-as-

sorted, etc., and worth only \$12,000, but avers they were reasonably worth \$15,000, denies that he offered to sell the good will of his trade, etc., but asserts that plaintiffs importuned him to sell his stock, and avers that he finally sold for \$15,000 to them, which was less than the goods were actually worth and subsequently invoiced, and denies that he agreed to sell the good will, and denies that said good will, etc., were left out of the contract by mistake; denies that he agreed and promised with said plaintiffs that he would not directly or indirectly engage in said business at said Mexico, while T. M. and R. W. Gill should prosecute it there, but admits he signed said memorandum, and avers that the same has no binding effect, being illegal and void as being in restraint of trade and against public policy.

Defendant admits plaintiffs took possession of said goods and commenced to prosecute said business at Mexico, under the firm name and style of T. M. Gill & Co., but denies they continued the same, and avers that said plaintiffs dissolved their co-partnership about January 1st, 1879, and published in the papers at Mexico, Missouri, notice of dissolution as follows :

“DISSOLUTION.”

“Notice is hereby given to all concerned, that on and after January, 1879, the partnership existing between T. M. Gill and R. W. Gill, under the firm name of T. M. Gill & Co., is dissolved, R. W. Gill retiring. Debts due the firm may be paid to either party, and the firm name remains T. M. Gill & Co.

T. M. GILL,
R. W. GILL.”

And avers that on and after the publishing of said notice said plaintiffs ceased to be partners and ceased to do business under the said firm name of T. M. Gill & Co.

Defendant admits that on the 1st of January, 1879, said T. M. and R. W. Gill formed a copartnership with one

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James Garrett, and have ever since been doing business with him under the firm name of Gill & Garrett, and avers that by so doing they vitiated the contract with him, denies that said contract was an asset of T. M. Gill & Co., avers that it was a personal contract with T. M. & R. W. Gill, denies that Garrett became part owner of said contract; admits that plaintiffs built a large store and moved out of his in March, 1880, and he moved into his store in March, 1880, and purchased and opened out in the same a large stock of hardware, hollowware, tinware, stoves, agricultural implements, etc., and prosecuted said business from that time until February, 23rd, 1881, the date of issuance of the injunction, and defendant largely advertised his business, and diligently attended to it, denies that he used any unfair means to injure plaintiffs, denies that he has damaged them, and avers that if their business has decreased it is their own fault, and avers that by the dissolution of the firm of T. M. Gill & Co., said firm and said T. M. Gill and R. W. Gill forfeited all their rights under said contract, both as a firm and as individuals, and that said dissolution and the formation of the firm of Gill & Garrett and carrying on business in that name is a forfeiture of said contract, and the said matters are pleaded as an estoppel.

Answer to second count, admits that plaintiffs on October, 15th, 1879, were carrying on the hardware business under the firm name of Gill & Garrett, denies *seriatim* the statements of petition in regard to \$100 worth of hardware and sale of same at \$290 and alleged agreement therewith, and pleads the statute of frauds in regard to all matters set forth in said second count, and for a further answer to plaintiffs' entire petition pleads an estoppel against the plaintiffs on account of their laches, and for that they knew of plaintiff's intention to fit up and stock said store with hardware, agricultural implements, etc., that plaintiffs saw with their own eyes the progress of said fitting up and stocking without any action and protest on their part, thereby assenting to the same; that they assented to de-

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fendant's carrying on said business on said premises without interruption on their part until February 23rd, 1881, when they filed their original petition in this case, and plea of estoppel is interposed as a special defense. And defendant prays for a dismissal of complainant's bill and an inquiry of damages on the injunction and for such other and further remedies, etc.

A replication was filed to the answer denying its counts.

And on the 16th day of November, 1881, said cause was tried by the court, which found and decreed as follows: That said contract, set out in the first count, was made by the parties as alleged; that there was no dissolution of the partnership between T. M. and R. W. Gill, and that defendant knew it at the time he resumed business in Mexico; that they have since the execution of said contract been continuously in the same business; that plaintiffs are not entitled to have a reformation of said contract, and that they are entitled to the relief prayed for in first count and finds for defendant on second count; and the temporary injunction granted is made perpetual, as long as plaintiffs continued in said business in Mexico, and gives them costs on first count, and gives defendant costs on second count.

The cause is before us on defendant's appeal from the judgment on the first and plaintiffs' appeal from that on the second count. That defendant bound himself by the contract set forth in the first count of the petition, not to engage in the same line of business he had been conducting in Mexico, Missouri, either directly or indirectly so long as T. M. Gill & Co., should prosecute it at that place, does not admit of dispute, unless, as defendant contends, it is that the contract is void because of its being in restraint of trade. It will be observed that the restraint imposed upon defendant is not that he would not at any time or at any place engage in the line of business he had been conducting, but only that he would not engage in it for a

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limited time, viz: so long as Gill & Co., conducted the business, nor at a particular place, viz: in Mexico Missouri.

Under the ruling of this court in the cases of *Wiggins Ferry Co. v. Railroad*, 73 Mo. 389; *Peltz et al. v. Eichele*, 62 Mo. 171; *Presbury v. Fischer*, 18 Mo. 50, such a contract is not void as being in restraint of trade, and the point made by counsel is not well taken.

It is claimed by counsel for defendant, that the obligation of defendant was to T. M. Gill & Co., a firm composed of T. M. Gill and R. W. Gill; and it is further claimed, that said firm was dissolved by reason of the notice of dissolution set up in defendant's answer and read in evidence, and also, by reason of the fact that one Garrett had been taken into the firm and its name changed from T. M. Gill & Co., to Gill & Garrett, and that in consequence of such dissolution the obligation of defendant to T. M. Gill & Co. was at an end and ceased to exist. If the firm of T. M. Gill & Co. had ceased to exist by dissolution, or by the taking in of a new partner and forming a new partnership, authorities are to be found among those cited sustaining the position taken by counsel as to the legal effect of such acts in releasing defendant from the restraint imposed upon him by the contract. But, the court found, as a fact, that the partnership of Gill & Co., had not been dissolved, and we think the evidence in the case warranted the finding.

It will be observed that the notice of dissolution was not that the firm of Gill & Co., at the time of its publication, was dissolved, but only looked to its dissolution on and after January, 1879.

It only gave notice to the public the then intention of the partners that the firm should be dissolved after a certain designated time. The evidence of the Gills was to the effect that this intention was never carried out, but that the partnership remained as before, except that on January 1st, 1879, the name of the firm was changed to Gill & Garrett, Garrett who had been their clerk on a salary, continuing

with them under an agreement that he was to get one-third of the profits as compensation for his services and was not to bear any of the losses.

If Garrett was operating for the firm with the understanding and agreement that he was to receive as compensation for his services one-third of the profits, and was not to be bound for any of the losses (and that such was the agreement is shown by Garrett's evidence,) this under the rulings of this court, did not make him a partner, nor constitute in legal contemplation, a new partnership. *Campbell v. Dent*, 54 Mo. 325; *Wiggins v. Graham*, 51 Mo. 17. Neither did the change of the name of the firm from Gill & Co. to Gill & Garrett affect any change in their rights as partners. 1 Lindley on Partnership, p. 211, where it is said "speaking generally the rights and liabilities of a firm cannot be effected by a change in its name, unaccompanied by a change in its members."

The doctrine of estoppel is, also invoked by defendant's counsel, and in support of it, it is claimed that defendant had the right to act upon the notice of dissolution, and to resume business. If the defendant did in fact resume business on the representation that R. W. Gill had withdrawn from the firm, there would be some foundation for the claim made that plaintiffs should be estopped from denying the fact. But the court found as a fact that at the time defendant resumed business he knew that the firm of T. M. Gill & Co., had not been dissolved, and there was evidence tending to establish the fact so found. Defendant testified that in September, 1879, R. W. Gill told him he was not in the business, while, on the other hand, said Gill testified that he told defendant he was in the business. As the court making this finding had the two witnesses before it, as well as other evidence tending to sustain it, we are unwilling to disturb it. It appears that in the progress of the cause a demurrer was filed to the original petition in which Garrett was made a party, which assigned as one of its grounds, that Garrett was not a proper party to the suit. It does not appear that the

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demurrer was finally disposed of, but it does appear from the supplemental record on file that upon an intimation by the court that it would be sustained, plaintiffs took leave to amend, and in the amended petition omitted the name of Garrett as a party. Defendant then filed a motion to dissolve the injunction, stating as the grounds for it, that the sustaining of the demurrer and filing the amended petition had the effect in law of dissolving the injunction. As we have seen, no order sustaining the demurrer was made, and the amendment as made would seem to be authorized by the statute relating to amending pleadings and proceedings. The cause of action in the original petition was based on the agreement made by defendant with T. M. Gill & Co. not to engage in a certain line of business in Mexico, the amended petition was based on the same agreement, the only difference being, that Garrett, who was an improper party in the original petition, was left out of the amended petition. "A misjoinder of plaintiffs is not ground to dissolve an injunction, but only of demurrer." Hilliard on Inj., p. 154, § 112. We perceive no error authorizing an interference with the judgment on the first count.

The judgment on the second count is appealed from by plaintiffs mainly on the ground that it is against the evidence. The evidence was conflicting, as to the fact whether the contract set up in the second count, as the groundwork of the action was or not made. The plaintiffs and Garrett testified that it was made as set out. Defendant testified to the contrary, and three other witnesses gave evidence tending to corroborate defendant's statement, and as this court, even in equity cases, will not interfere when questions of fact have been passed upon by the trial court and there is evidence on both sides, unless the decision is clearly erroneous, we will not disturb the judgment on the second count, inasmuch as the evidence seems to be evenly balanced.

What has been said results in an affirmance of the judgment, and it is hereby affirmed. All concur.

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MORROW v. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

Railroads: DOUBLE DAMAGES: STATEMENT. A statement in an action before a justice of the peace, against a railroad for double damages for killing stock, must allege that the stock entered upon defendant's road at a point where it was required to fence, or facts must be stated from which this may be legitimately inferred. Simply alleging that the hogs strayed upon the track of defendant's road at the times and places stated, where the road was not fenced with a good and sufficient fence, and not at any public or private crossing, is insufficient.

Appeal from Cass Circuit Court.—HON. NOAH M. GIVAN, Judge.

REVERSED.

Smith & Krauthoff with *T. J. Portis* for appellant.

The statement in this case cannot be held sufficient under the most liberal practice. *Davis v. Railroad Co.*, 65 Mo. 44; *Johnson v. Railroad Co.*, 76 Mo. 553. Nor is there any allegation from which it may be inferred, that the alleged killings were occasioned in any wise by the failure to fence. *Johnson v. Railroad Co.*, *supra*,; *Sloan v. Railroad Co.*, 74 Mo. 47; *Nance v. Railroad Co.*, 79 Mo. 196; *Dryden v. Smith*, 79 Mo. 525.

F. P. Wright, for respondent.

The statement is sufficient. *Farrell v. Union Trust Co.*, 77 Mo. 475; *Terry v. Railroad Co.*, 77 Mo. 254.

PHILIPS, C.—This is an action to recover double damages for the killing of hogs by defendant's train of cars. Judgment in justice's court for plaintiff. On appeal to the circuit court the plaintiff filed the following amended statement on which the cause was tried:

"Plaintiff, for an amended statement herein, states

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that the defendant is the owner and operator of a certain railroad leading from the city of St. Louis in the State of Missouri, and passing westward through Cass county in said State, and of certain cars and locomotives running thereon. That the plaintiff was the owner of certain hogs which strayed upon the track of said railroad without the knowledge or fault of plaintiff, in Big Creek township, Cass county, Missouri, and was of the value as follows, and killed at the following times: That on the 22d day of March, 1880, the defendant ran its engine and train of cars against and over one brood sow of the value of \$15; that on the 10th day of March of the same year, the defendant ran its engine and train of cars against and over one hog of the value of \$6; that on the 14th day of March and in the same year the defendant ran its engine and train of cars against and over three of plaintiff's hogs of the value of \$12; and at another time, and on the same day, the defendant ran its engines and train of cars over one of plaintiff's hogs of the value of \$10, and at the same time the defendant ran its engine and train of cars against and over one brood sow of the value of \$16; that on the — day of August, 1879, the defendant ran its engine and train of cars against and over two of plaintiff's brood sows of the value of \$30. Plaintiff says that all of said hogs strayed upon the track of defendant's road at the times and places above stated in Big Creek township, Cass county, where the said road was not fenced with a good and sufficient fence, and not on any public or private crossing of said road and without the fault of plaintiff, were killed at the times and places aforesaid, and plaintiff states that by reason of said killing of said hogs as aforesaid in the various sums aforesaid he is damaged in the sum of \$85, and asks that it be doubled, and that he have judgment for the sum of \$170—double the value of said hogs—with interest and costs."

The defendant made motion to dismiss the action for various reasons, and objected to the introduction of any evidence under the statement on account of its insufficiency.

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All of which the court overruled. The plaintiff having again prevailed in the action, the defendant prosecutes this appeal.

The principal question for determination on this record is, does the statement sufficiently present a cause of action under section 809 of the Revised Statutes. It has been repeatedly held that to constitute a cause of action under this section it must affirmatively appear from the statement or petition that the animal got upon the railroad track at a point where the company had neglected to erect and maintain a substantial fence, as by said section required, and that the alleged injury to such animal resulted therefrom. *Cecil v. P. R. R. Co.*, 47 Mo. 249; *Davis v. Railroad Co.*, 65 Mo. 44; *Johnson v. Railroad Co.*, 76 Mo. 553. The statement in this case simply avers that the hogs "strayed upon the track of defendant's road at the times and places above stated, etc., where the road was not fenced with a good and sufficient fence, and not at any public or private crossing," etc. But it is nowhere averred that the point where they so entered was where the defendant was required to erect such a fence, nor is any fact averred from which such inference might legitimately be drawn. It is not averred that it was at a point where by law defendant was required to build a fence, or that he sues under section 809. The point where the hogs got upon the track may have been inside the corporate limits of a town where streets and alleys were laid off and in use, and where no obligation is imposed, by law, on defendant to fence, and yet this statement be true in fact. Nor is there any equivalent fact stated by which this inference might be negatived.

None of the many cases recently approved by this court have gone to the extent of upholding this statement. *Sloan v. Railroad Co.*, 74 Mo. 47; *Nance v. Railroad Co.*, 79 Mo. 196; *Dryden v. Smith*, 79 Mo. 525; *Jackson v. Railroad Co.*, 80 Mo. 147.

The judgment of the circuit court must, therefore, be

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reversed and the cause remanded with leave to plaintiff to amend. All concur, except NORTON and SHERWOOD, JJ., absent.

JASPER COUNTY V. WADLOW *et al.*, Appellants.

1. **Swamp Land, Selection of:** TITLE: EVIDENCE. The report of the Secretary of the Interior of the United States to the State, confirming land as swamp land, and the patent of the land by the State to a county, vests the title in the latter; and in ejectment by the county to recover the land, the defendant cannot assail such title by showing that the land was not in fact swamp land, and that the Secretary of the Interior had made a mistake in confirming it as such.
2. **Judgment for Taxes, Purchaser Under:** WHAT INTEREST HE ACQUIRES. A sale and deed of land under a judgment for taxes, is only effectual to pass the title of the parties to the tax suit. If, at the time of such sale, the defendant had only a right to a deed on the payment of the purchase money, that is all the interest the purchaser at the sale would acquire.
3. **Order of Publication:** DEFECTS IN, WHEN NOT COLLATERALLY ASSAILABLE. An order of publication of notice of a suit which requires the defendant "to appear on the first Monday, 1877, of the next term of the court to be holden in Carthage," is not so defective as to be subject to collateral attack. While the first Monday of the month on which the next term of the court was to be held was not directly named, it was so inferentially, as the law designated the first Monday of May, 1877, as the time when the next term of the court was to be held after the publication.
4. **Ejectment:** COMPENSATION FOR IMPROVEMENTS. A defendant in ejectment can obtain compensation for improvements only in the manner provided by Revised Statutes, sections 2259, 2260.
5. **Judgment Without Notice:** PRACTICE. A judgment will be reversed where one of the defendants against whom it was rendered, was not served with summons and was not otherwise brought into court.

Appeal from Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED.

C. H. Krum and William Thompson for appellants.

Appellants have a fee simple title to the land in controversy. 1st, Under the statute of limitations; 2nd, Under sheriff's deed for taxes, dated March 29th, 1879. The certified copy of the report of the Secretary to the Register of Lands of Missouri, and the patent from the State to Jasper county was not a sufficient showing of legal title in the county to entitle it to recover. *Stephenson v. Stephenson*, 71 Mo. 127; U. S. Rev. Stat., § 2479 to § 2481; *Ib.*, § 2484; *Funkhouser v. Peck*, 67 Mo. 31. The tax deed under which appellants claim title entitled them to a judgment. *DeTreville v. Small*, 98 U. S.; *Welsh v. Kelley*, 69 Mo. 343; *Raley v. Guinn*, 76 Mo. 263; *Ewart v. Davis*, 76 Mo. 129; R. S., § 6839; 2 Wag. Stat., p. 1206, § 219. The judgment against T. C. H. and Lucy W. Smith was rendered without notice, is, therefore, void, and may be attacked collaterally. *Napton v. Leaton*, 71 Mo. 366, 367; R. S., §§ 3494, 3500; *Bobb v. Woodward*, 42 Mo. 482; *Higgins v. Peltzer*, 49 Mo. 152; *Cravens v. Moore*, 61 Mo. 178.

Phelps & Brown and T. B. Haughwout for respondent

The patent from the state vested in plaintiff the legal title to the land. R. S. § 6204. The objection to the proceeding to enforce the vendor's lien that the order of publication was defective, is not available here. The judgment recites that the defendant had been duly notified, and is conclusive upon the parties and cannot be set aside in a collateral proceeding. *Bradley v. Ramey*, 67 Mo. 280; *Kane v. McCowan*, 55 Mo. 181. The order of publication was sufficient; it notified the defendant to appear at the "next regular term of the court," and the law fixed the time for holding the court of which the defendant was bound to take notice when the order of publication was silent as to commencement of the term. The purchase money being due and unpaid, the plaintiff could maintain

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ejectment to recover possession of the premises against Lucy W. Smith, the vendee, or any person claiming under her, even if her equity had not been foreclosed, and the action could only be defeated by offering to pay for the lands. Sedgwick & Wait on Trial of Title to Land, §§ 306, 307; *Home Mfg. Co. v. Gough*, 2 Brad. (Ill.) 477; *Hill v. Winn*, 60 Ga. 339. The defendant claiming under Lucy W. Smith, the vendee of plaintiff, he cannot dispute the title of plaintiff. Sedgwick & Wait on Trial of Title to Land, § 317; *Pershing v. Canfield*, 70 Mo. 140; *Lesher v. Sherwin*, 86 Ill., 420; *Lenbury v. Stewart*, 22 Ala. 207; *Jackson v. Bard*, 4 John. (N. Y.) 230; *Harvey v. Morris*, 63 Mo. 475. The defendant acquired no interest in the land by his purchase at the tax sale. At the time the tax suit was brought the interest of Lucy W. Smith having been purchased and owned by Jasper county, the land was not subject to taxation. R. S. § 6659. If, however, it should be held that the land was subject to taxation, still Jasper county, not being a party to the tax suit, her interest in the land could not be sold and did not pass by the tax sale. Only the parties to the suit can be affected by the judgment and sale thereunder.

NORTON, J.—This is an action of ejectment commenced in the circuit court of Jasper county and taken by change of venue to Lawrence county. The suit was brought against James M. and E. D. Wadlow for the recovery of the possession of 280 acres of land in the petition described. Wm. Thompson was on his own application made defendant as the landlord of defendant Wadlow. The petition is in the usual form; the answer, after admitting that defendant was in possession of the premises, denies all the other allegations of the petition and sets up adverse possession for more than ten years before the suit was brought. The reply put in issue the new matter. On the trial plaintiff obtained judgment from which defendants appealed to this court.

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On the trial, plaintiff, in support of her title, put in evidence a certified copy of the report of the Secretary of the Interior to the Register of Lands of Missouri confirming the selection of the lands as swamp land. Plaintiff next put in evidence a patent from the State of Missouri conveying to Jasper county the land in dispute. Plaintiff then offered S. G. Franklin as a witness who testified that about 35 acres of the land occupied by defendant, Wadlow, was in cultivation. This witness, on cross-examination, stated that the land sued for "was not wet, swampy or overflowed land; that it was high rolling prairie; that the entire section was high, dry, rolling prairie;" other evidence was offered as to the rental value and plaintiff rested. Whereupon defendant asked the court to give an instruction that, "upon the evidence plaintiff could not recover," which the court refused to give, and this action is complained of as being erroneous.

The court did not err in this ruling. The selection of the land in controversy, as swamp land, having been confirmed to the State by the report of the Secretary of the Interior, and a patent for the same having issued from the State to Jasper county, plaintiff was invested with a complete title, behind which defendant could not go, and show by parol or otherwise, that the land, in fact, was not swamp land, and that the Secretary of the Interior had made a mistake in confirming the selection of the same as swamp land. *Funkhouser v. Peck*, 67 Mo. 19; *Stephenson v. Stephenson*, 71 Mo. 127. Besides this it is expressly provided in Revised Statute, section 6204 that all patents issued, as required by that act, shall be received and read as evidence in all courts in this State as *prima facie* evidence of title in the counties where overflowed or swamp land lies.

The defendant then put in evidence an order of the county court of Jasper county made on the 11th of February, 1858, authorizing the sale of the swamp lands of the county to one George E. Ward, including the land in controversy. This order authorized the sale of said land or

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twelve months' time, the purchaser to give his note with security for the purchase price, and contained the further provision that the purchaser should be entitled to a deed from the county when the purchase price was paid. Defendant, also, put in evidence an order of said court made on the 27th of February, 1858, approving the report of sale made by the commissioner in conformity with the said order of the 11th of February, 1858, and directing the commissioner to make deeds to the purchasers of the lands whenever the purchase money was fully paid. The defendant then put in evidence various deeds which had the effect of passing to one Lucy W. Smith whatever interest said Ward took in the lands by virtue of his purchase from the county, which was nothing more than a right to a deed from Jasper county when the purchase money was paid.

It, also, appeared in evidence that Jasper county had, in 1873, contracted the land in controversy with other land to said Lucy W. Smith, taking her note for the unpaid purchase money in the sum of \$2,005.75. Defendant, also, put in evidence a tax deed conveying the interest of Lucy W. Smith to E. G. Thompson, and also a deed from the heirs of E. G. Thompson to defendant, William Thompson, it having been shown that said E. G. Thompson had died. Said tax deed was dated the 28th of March, 1879. Defendant then read in evidence the record of a judgment rendered in October, 1878, in a suit by the *State ex rel Wakefield, collector of Jasper county, v. T. C. H. Smith and Lucy W. Smith* for the enforcement of the State's lien for delinquent taxes for the years 1875 and 1876. Defendant, also, put in evidence a promissory note of said Lucy W. Smith to Jasper county and order of publication as to Lucy W. Smith and T. C. H. Smith in a suit instituted by Jasper county against said Smiths to enforce the lien of the county upon said land for the payment of the purchase money. It was then admitted that the land was neither swampy, wet or overflowed, and witness, Mickey, testified that she had lived on the land for more than ten years before this

suit was brought as the tenant of said Smith, and then as the tenant of said Thompsons.

In rebuttal, plaintiff put in evidence the judgement in the case of *Jasper county v. T. C. H. and Lucy Smith*, foreclosing the vendor's lien upon the land in suit, and also a sheriff's deed, made in pursuance of an execution which issued upon the judgment, foreclosing plaintiff's lien for purchase money on said land, and conveying all the interest of the said Smiths to Jasper county. This deed was duly executed and acknowledged on the 29th of January, 1878, and filed for record on the first day of February, 1878, the judgment on which the execution issued was rendered Nov. 20th, 1877.

This was all the evidence. Although no instructions were asked or given, inasmuch as the claim by the respective parties is based upon proper evidence of title it is our duty to pass upon the legal effect thereof.

The report of the Secretary of the Interior, confirming the selection of the land in question as swamp land to the State, and the patent from the State to Jasper county for the same, vested the title in the county, and entitled it to a recovery, unless the defendant in some way acquired the title from the county. We are of the opinion that the evidence fails to show that the county had parted with its title, either to defendant or those under whom he claims. In the contract made by Jasper county with Lucy W. Smith the county retained the title and only agreed to divest herself of it when the purchase money was fully paid. It is not pretended that this was done, either by defendant or those under whom he claims. It is, however, earnestly contended by counsel that the tax deed read in evidence had the effect of putting the title of the county in defendant's grantor. This position, we think, cannot be maintained for the reason that the record in the suit to foreclose the lein of the State for taxes, shows that Jasper county was not a party to that proceeding. T. C. H. Smith, Lucy Smith and one Bradshaw were the only de-

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feudants. The sale and deed, made under the judgment, was, therefore, only effectual to pass the title of said parties, whatever it was. If, at the time of the tax sale, Lucy W. Smith had nothing more under her contract than the right to have a deed from the county to the land on payment of the purchase money, that was all the defendant's grantor, E. G. Thompson, acquired.

There is still another reason why defendant, under the evidence, is not entitled to judgment. It is this: Jasper county under the sale and deed made by the sheriff in virtue of an execution issued on a judgment in the case of *Jasper County v. Lucy W. and T. C. H. Smith* to foreclose the lien of the county on said land for the unpaid purchase money, acquired whatever equitable interest said parties had in said land, and the deed conveying this interest was filed for record before the rendition of judgment in the tax suit.

It is agreed by counsel that the judgment rendered in the suit to foreclose the vendor's lien, because of irregularities and defects in the order of publication is utterly void. The order of publication was dated the 10th of February, 1877; it states the title of the cause, the court in which it is pending, the general nature and object of the suit, and notifies defendants that unless they be and appear at the next term of said court to be holden at the court house in the city of Carthage, in the county and State aforesaid, on the first Monday, A. D., 1877, and on or before the third day thereof, if the term shall so long continue, &c. Proof of publication of this notice was made before the court, showing the first insertion to have been made in the Carthage Banner on the 15th day of February, 1877, and for four successive weeks, the last insertion being on the 8th of March, 1877. The proof of publication was filed on the 15th of April, 1877, and the next term of the court was the first Monday in May, 1877. The court of Common Pleas, in which the suit was pending, held six terms annually, viz.: first Mondays in January, February,

May, June, October and November. Judgment in the case was rendered at the October term, 1877. Counsel insist that the notice for defendants "to appear at the next term of said court, to be holden at Carthage on the first Monday, 1877, and on or before the third day thereof," means that they should appear on the first Monday in January, 1877. This construction we think an erroneous one, and the notice may more probably be read for defendants to appear on the first Monday, 1877, of the next term of the court and on or before the third day thereof.

When the order of publication complies substantially with the statute, as we think the one in this case does, while it might be open to direct attack, the judgment based upon it is not a nullity, and therefore, not subject to be assailed collaterally. *Brawley v. Ranney*, 67 Mo. 280, and cases cited; *Kane v. McCowan*, 55 Mo. 181; 57 Mo. 160. When the irregularity is such as to make the judgment a nullity and absolutely void, it may be the subject of collateral attack. We do not think that the defect or irregularity complained of is of that character. The defendants are informed by the notice of the court in which the suit is pending that the suit is founded upon a note, the date and amount of which is given, the rate of interest it bears, and that it was given for the purchase price of certain lands, describing them and including the lands in controversy in this suit, and that they were required to appear on the first Monday, 1877 of the next term of court to be holden in Carthage. While the first Monday of the month on which the next term was to be held is not directly named, we think it is inferentially, as the law designated the first Monday of May, 1877, as the time when the next term of court was to be held after the publication.

It was observed in argument that valuable improvements had been made by defendants on certain of the premises in controversy. As to this, it may be said the only way for a defendant in ejectment to obtain the value of improvements made by him in good faith, is to proceed

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as provided in sections 2259-2260 R. S., after judgment against him for possession. *McClannahan v. Smith*, 76 Mo. 428.

The question, as to whether defendant, notwithstanding the foreclosure of the vendor's lien, may or may not have the right still to pay the purchase money, is not involved in this case on the record before us, and hence we do not discuss it. A kindred question to it is discussed in the case of *Stafford v. Fizer*, *post*.

It appears from the record that E. D. Wadlow, one of the defendants, was neither served with summons nor in any other manner brought into court, and that judgment was taken against him, as well as the other defendants; this under the ruling of this court in the case of *Holt County v. Harmon*, 59 Mo. 165, was erroneous, and for that error the judgment is reversed and the cause remanded. All concur.

TEVERBAUGH *et al.*, Appellants, v. HAWKINS

Administration: SALE OF LAND: VOID ORDER. An order of probate court for the sale of land of a decedent, for the payment of his debts without a petition therefor, and without notice of the intention to apply for the same as required by law, is void, and a sale thereunder will pass no title, except where on a settlement of the accounts of the administrator, it appears the personal estate is insufficient to pay the debts of the estate; in which case the court can make the order of sale of its own motion.

Appeal from Ozark Circuit Court.—HON. J. R. WOODSIDE,
Judge.

REVERSED.

Smith & Krauthoff with *A. H. Livingston* for appellants.

The administrator's sale was void. No petition for

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order of sale was ever presented to the probate court. Gen. St. 1865. p. 497, § 10; p. 498, § 22; *Jarvis v. Russick*, 12 Mo. 63; *Bompart v. Lucas*, 21 Mo. 598; *Pryor v. Downey*, 50 Cal. 388. Nor was any notice of the contemplated order of sale ever given. *Patee v. Mowry*, 59 Mo. 161, 194; 7 South. Law Review, p. 651, *et seq.* There was no settlement of the administrator's accounts until after the alleged order of sale, hence it could not have been made under General Statutes 1865, p. 500, § 47. The pretended order of sale is invalid and passed no title, because on its face it does not purport to be made for the purpose of paying debts of the deceased, *i. e.*, those in existence at the death of the deceased. *Farrar v. Dean*, 24 Mo. 16; *Presbyterian Church v. McElhinney*, 61 Mo. 540; 7 South. Law Review, p. 647.

Hamilton & Fisher with Monks & Green for respondent.

Whether the administrator's deed was void or voidable, it nevertheless afforded color of title, and defendant's possession since December 28th, 1866, gave him title by limitation. *Biddle v. Mellor*, 13 Mo. 335; *Blair v. Smith*, 16 Mo. 273; *Shaw v. Nichols*, 30 Mo. 99; *Warfield v. Cindell*, 38 Mo. 561; *Nelson v. Broadback*, 44 Mo. 596; *Wall v. Schindler*, 47 Mo. 282; *Wilcoxon v. Osborn*, 77 Mo. 621. It is not necessary to plead the statute of limitations in ejectment. 44 Mo. 596. The administrator's deed could not be assailed collaterally. *Johnson v. Beasley*, 65 Mo. 254; *Tutt v. Boyer*, 51 Mo. 425; *State ex rel. Yarnell v. Cole Co.*, 80 Mo. 80.

HENRY, J.—This is an action of ejectment to recover a tract of land in Ozark county. The petition is in the usual form and the answer a general denial. The cause was tried by the court without the intervention of a jury, and from a judgment in favor of defendant plaintiffs appealed. The plaintiffs claim title as the heirs at law of

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Solomon Teverbaugh, deceased. The land was entered by one A. D. Hitt who, the evidence tended to prove, conveyed it to said Teverbaugh by deed, the existence and destruction of which was proved by witnesses who testified that they had seen the deed.

Defendant claims title as purchaser at a sale of said land, alleged to have been ordered by the probate court of said county for the payment of debts. He introduced as evidence the administrator's deed, dated December 28th, 1866, which contained the requisite recitals, and, by its terms conveyed the land in question to the defendant, and rested.

Plaintiff then introduced the records of the probate court, showing the order of sale, made November 8th, 1866, the approval of said sale by said court, December 14th, 1876, the inventory of said estate, which embraced no other property than the real estate in controversy. The first annual settlement of the administrator was then introduced in which he charged himself with \$200, the amount received for the land and took credits as follows:

Witnesses to inventory.....	\$ 2 00
Six appraisers.....	6 00
Clerk's fees.....	2 50
Printer's fees	3 00
Notary's fee.....	75
Administrator's fees.....	41 75
Commission	19 00
	<hr/>
	\$75 00

Charging himself with a balance of \$125.

In his second annual settlement, he charged himself with the balance due on the first settlement \$125, and the only credit was one item of \$21, for fees, and, in his final settlement, charging himself with the balance against him on the second settlement he credits himself by \$32.65 (printer's, notary's, administrators' and clerk's fees). Taxes for 1868, \$4.60; amt. paid Ratliff, \$34.93. Taxes for

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1869, \$4.32, and amt. paid Hawkins, \$34.00. On what account those payments were made to Ratliff and Hawkins does not appear. There is nothing in the record showing that the estate was indebted at all, when the administrator who made the sale took charge of the estate, and the order of sale is that "the land be sold to pay taxes, and to defray other expenses of said estate." No petition was ever presented to the probate court for a sale of the land, nor was any notice given of the intention to apply for the order.

This court has, in recent adjudications, gone very far beyond the earlier decisions, in upholding administrators' sales; but I know of no case in which it has held such sales valid, when there was no petition filed, nor any notice given of the intended application for an order to sell, except where on a settlement of the accounts of the administrator, it appears that the personal estate is insufficient to pay the debts, when the court by the statute, is authorized to make the order of its own motion.

"No provision is (in such case) made for giving notice, because the settlement is made at a time prescribed by law and when everybody is legally notified of that fact." *Patte v. Mowry*, 59 Mo. 163. In the same case it was observed that: "The application for the order of sale (by the administrator) may be made at any term. As the law does not prescribe the term, a notice is required to give jurisdiction, that all persons may be present and have a hearing." Even a petition, without the notice, would not give the court jurisdiction. Here there was neither, and plaintiff's second instruction should have been given. It declared that the whole proceeding in the probate court, with respect to the order of sale, was utterly void and that no legal title passed to defendant by the sale and deed made under it. The statute of limitations was not pleaded, nor was any evidence introduced, although it might have been without such plea, or any instructions asked on that

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question, by either party and, therefore, it cannot be considered on this appeal.

This record presents a state of facts not calculated to impress one very favorably with the defendant's claim of title. The inventory shows no other property belonging to this estate, but the land in suit. No statement of any indebtedness of the intestate is shown upon which the order of sale was based. It nowhere appears that when that order was made the estate owed a dollar, except exorbitant costs of administration and for taxes which accrued two years after the death of the intestate. It does not appear upon what account two of the largest items of credit, in the second annual settlement, were paid, or when such indebtedness accrued. The bulk of the credits allowed the administrator in his settlements, consists of his commissions, clerks', notaries', and printers' fees, and the balance of debts which had no existence when the letters of administration were granted; and the language of Judge Ryland in the case of *Farrar v. Dean*, 24 Mo. 19, with slight modifications, may very appropriately be repeated in this connection: "We cannot shut our eyes to the fact that the administration was begun for the purpose of selling the lot, not for the purpose of paying his debts, for there were none, but to get hold of his real estate by means seemingly consistent with law; and, therefore, the administration began. It made costs, and then sold the property, the lot, to pay them." *Presbyterian Church v. McElhanney*, 61 Mo. 540.

The judgment is reversed and the cause remanded. All concur, except Hough, C. J., absent.

THE STATE *ex rel.* HARVEY v. COOK, *Appellant.*

1. **Revenue: ASSESSOR'S BOOK: VERIFICATION.** Wagner's Statutes, section 61, p. 1170, relating to assessment of revenue, authorizes but one tax book, which shall contain the lists of both real and personal property, and where the assessor made out for the year 1873 a book for each kind of property, but failed to verify the land book, the assessment for such year was invalid.
2. **Assessment of Land, when based on Former Year: NEW BOOK.** Although the law provides that an assessment of land shall stand good for two years, and that the assessment of the second year shall be based on the first, yet such assessment, when based on the former one, has to be made out in a new book, and the old one returned to the clerk of the county court.
3. **Invalid Assessment.** The assessment for the second year in this case, held invalid for two reasons: 1st, Because there was no legal assessment for the first year, the assessor having failed to verify it by his affidavit as required by law; 2nd, Because the assessor made out no new land book for the second year as required by said section 61, Wagner's Statutes, p. 1170.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY,
Judge.

REVERSED.

W. B. Martindale for appellant.

The assessment for 1873 was not verified as required by law. Wag. Stat., § 61, chap. 118. It is nowhere provided that the assessment may be divided into two books, nor that a certificate attached to one book shall sufficiently authenticate some other book. One book, the land assessment one, must be treated as not certified to. *Newell v. Smith*, 38 Wis. 39. For 1874 no assessment whatever of lands was made or returned. The assessment of 1873 could not supply the place of a new assessment altogether for 1874. Wag. Stat. 1872, chap. 118, §§ 38, 61, 65. There being no land assessment for 1874, no land tax book could be made, and the tax assumed to be levied for that year was void. *Cooley on Taxation*, p. 259; *Thurston v. Little*, 3 Mass. 429; *Mason v. Whitney*, 1 Pick. 140; *People v. Hastings*, 29 Cal. 449.

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Bryan & Sanders for respondent.

SHERWOOD, J.—Action brought in 1878 for taxes due on certain land for the years 1873 and 1874. Section 61, 2 Wag. Stat. 1170 provides that: "The assessor shall make out and return to the county court, on or before the 20th day of January in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto in the following words, etc." This section so far as quoted shows in plain and unambiguous language that there is but one book authorized by this section, and further on the section shows that the book to be made out by the assessor is to contain lists of both real and personal property. This section was not obeyed in the present case. The assessor when making out his book for the year 1873 made out two instead of one. That relating to personal property was verified as required by law, except that the words, "foregoing books," were used in the affidavit "annexed thereto," but there was no affidavit annexed to the book which contained the land list and, of course, there was no verification of that list or that book. Sec. 38, chap. 118, Wag. Stat. (Ed. 1878) reads: "The clerk of the county court shall deliver to the assessor, on or before the first day of August, 1871 and 1872, and every two years thereafter, the assessor's book of the last assessment of real estate, * * * and the assessor, so soon as he shall have completed his assessment for the year and made his assessor's book shall return" the same, etc.

This section, though so explicit, did not meet with compliance; for there was no land assessment or book for the year 1874 made or returned to the clerk as required by that section. True, the law provides that where an assessment of land is made, it shall stand good for two years, and that the assessment of the second year shall be based upon that of the first, but still, an assessment, though based on the former one has to be made out in a new book, and the

old one returned to the clerk of the county court. The law knows but one assessor's book, which contains both the real and personal property, and of this book section 61, *supra* requires that the assessor make out and return to the county court a fair copy every year, and section 65 of the same chapter requires that the clerk of the county court make a fair copy of the assessor's book, authenticated by the seal of the court, and deliver the same to the collector. And if the land list for 1873 was not verified as required by law, as already seen, there could not be any valid basis on which to make out, either an assessor's book, or, an assessment, at least, so far as land was concerned for the year 1874.

Treating of proceedings of the nature now being discussed an eminent jurist and author remarks: "Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation and it is the foundation of all which follow it. Without an assessment they have no support and are nullities. It is, therefore, not only indispensable, but in making it the provisions of the statute must be observed with particularity. If this were not compulsory, if the officers were to be at liberty to disregard important provisions of the statute in this initiatory step, the chief protection which the law has intended for individuals in tax cases would be removed." Cooley on Tax., 260. And when discussing the necessity of the authentication of the work of the assessor the same author remarks: "The result of the action of the assessor is embodied in an assessment roll or list. The statutes provide how this shall be authenticated and compliance with their provisions is expected. The methods are different in the different States and are sometimes changed in the same State. But the rule of law is clear." *Ib.* 289. In another work on taxation when speaking of authentication of documents

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relating to taxation language of similar purport is employed. Blackwell Tax. Tit., pp. 112, 113, 348 and 349. In *Johnson v. Elwood*, 53 N. Y. 435, it was held that where the assessment roll lacked verification by the affidavit of the assessor, this defect would render void the tax deed. In another case, where the law required the roll to be signed and a certificate to be attached, the signing of the certificate was held not to dispense with the signing of the roll, and if that was not signed no proceedings could be taken upon it. *Sibley v. Smith*, 2 Mich. 486. Similar rulings have occurred in reference to affidavits of assessors to their assessment rolls in the State of Wisconsin, and that such affidavits in compliance with the statute in every particular were matters of substance and not of mere form, and that a failure to comply with the statute in this regard was fatal to all subsequent proceedings. *Marsh v. Supervisors*, 42 Wis. 502; *Plumer v. Supervisors*, 46 Wis. 163. And in the *Town of Warrensburg ex rel. Colbern v. Miller*, 77 Mo. 56, where the town charter required that the assessor return to the council his tax book, and that a copy of this, so far as concerned the delinquent taxes, should be made out and delivered to the collector, and this was not done, but the original assessor's book was by resolution of the council delivered to the collector in lieu and stead thereof, the whole proceedings were held invalid and that the collector could not take shelter under them.

Tested by the rules announced in the authorities cited, the tax proceedings in the case at bar must be held for naught. The assessment roll of 1873, because not verified as required by law, and the assessment of 1874 are invalid for two reasons: first, because it had no basis whereon to rest, to-wit: a legal assessment in 1873; and second, because the assessor made out no book, embracing a land assessment for the year 1874 as required by section 61, *supra*.

In respect to the question of whether the suit of the former collector abated upon expiration of his term of

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office, it suffices to say that it is too late to raise the question here after entering an appearance to the action as revived in the court below. And in regard to the sale in the probate court of the land now sought to be taxed, such a sale could not defeat any right which the State had against the land for taxes accruing prior to such sale.

For the reasons aforesaid, the judgment should be reversed and the cause remanded. All concur. Hough, C. J., absent.

LEBOURGEOISE *et al.* v. MCNAMARA *et al.*, *Plaintiffs in Error.*

1. **Partition:** GUARDIAN AD LITEM, POWERS OF. A guardian *ad litem* of an infant in a partition suit, has authority to bind his ward by a stipulation in the nature of a waiver of proof.
2. ———: ———: ———. Under the statute, (2 Wag. Stat., p. 973, §§ 48, 49,) a guardian *ad litem* of an infant in a partition proceeding, seems to be clothed with the full powers of his ward after removal of disabilities.

Error to St. Louis Court of Appeals.

AFFIRMED.

G. M. Stewart for plaintiffs in error.

The infant defendants were improperly made parties to the partition proceedings, and there should have been no decree affecting their rights to the land. *Stevens v. Endres*, 13 N. J. L. 271; *Culver v. Culver*, 2 Root 278; *Zeigler v. Grum*, 6 Watts 106; *Brown v. Brown*, 8 N. H. 93. It was error to enter a decree upon the stipulation filed. A guardian *ad litem* has no power to waive proof, nor any right without it to consent to judgment or to the confirmation of the commissioner's report. *Revely v. Skinner*, 33 Mo. 101; *McClure v. Farthing*, 51 Mo. 109; *Howell v. Mills*, 53

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N. Y. 322; *Kinckerbacker v. De Forrest*, 2 Paige 304; *Walton v. Coulson*, 1 McLean 120; *McClay v. Norris*, 9 Ill. 370; *Waterman v. Lawrence*, 19 Cal. 210; *Cartwright v. Wise*, 14 Ill. 417; *Jones v. Jones*, 56 Ala. 612. The writ of error *coram nobis* should have been granted. *Calloway v. Nefong*, 1 Mo. 223; *Ex parte Toney*, 11 Mo. 662; *Powell v. Gott*, 13 Mo. 458; *Latshaw v. McNees*, 50 Mo. 381; *Ex parte Gray*, 77 Mo. 160; *Higbie v. Comstock*, 1 Den. 652.

D. T. Jewett for defendants in error.

The guardian *ad litem* had under the statute the power exercised by him in the partition proceeding. 2 Wag. Stat., p. 973, §§ 48, 49.

MARTIN, C.—This was an action for the partition of certain lands in St. Louis and was begun in 1874. The only question necessary to be considered relates to the power of guardians *ad litem* in partition cases. The defendants, Walter, Victor, Belle, Arthur and Lulu McNamara were minors and the court appointed A. J. Quigley as guardian *ad litem* to represent them in the suit. The appointment was accepted and a general answer filed putting in issue the material allegations of the petition. Afterwards the following stipulation signed by counsel in the case was filed:

“It is agreed that judgment of partition, as prayed for, is to be entered against defendants, except Sally Dodier, whose name is to be stricken from the petition—default as to J. Q. A. Fritchey—commissioners to be appointed, to report in any report or partition they may make, the said defendant, Leonora E. McNamara, is to have the benefit of all buildings put up on the premises by her, but not those by her tenants.

D. T. JEWETT,
Attorney for Plaintiffs.
A. J. QUIGLEY,
Attorney for Defendant.”

In May, 1875, the court rendered its decree in partition which reads as follows:

"Now, at this day come the plaintiffs and defendants by their respective attorneys, but the defendant, John Q. A. Fritchey, though duly summoned and called, comes not, but makes default. Wherefore, it is ordered that the petition herein be taken against him as confessed, and thereupon the cause is submitted to the court upon the evidence and proofs, and also a stipulation filed this day by said parties, and the court being fully advised thereof, doth order that the name of Sally Dodier, defendant, be stricken from the petition by consent of the attorneys for plaintiffs and defendants, and doth find, adjudge and decree, that the plaintiffs and defendants are the owners in fee and tenants in common, and in possession of the following real estate, to-wit:" (Here the property is described.) It then says that plaintiffs are entitled to have partition made, and the said several parts set off to them in severalty as prayed for, etc.

Although this decree recites that the cause was submitted upon the "evidence and proofs," it, also, recites that it was submitted upon "a stipulation filed this day by said parties." As this stipulation dispensed with proofs, so far as the minors were concerned, it is impossible to resist the inference that the decree, as to them, must have been principally rendered in pursuance of the stipulation which was intended to take the place of proofs.

On the 1st of December, 1879, Isabella McNamara, one of the infant defendants, having attained her majority, filed a petition in the cause in which she set out the proceedings already had in the case and the title of the minor defendants, and asked for a writ of error *coram nobis*. Upon denial of the application she sued out a writ of error to the St. Louis court of appeals. The decree in that court was affirmed, and she prosecutes her present writ of error. *LeBourgeoise v. McNamara*, 10 Mo. App. 116. The power of a guardian *ad litem* to admit material facts in the con-

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duct of a trial, or to control the case entrusted to his charge with as full authority as the minor could, if he were of age, has been denied by our Supreme Court. *Revely v. Skinner*, 33 Mo. 98; *McClure v. Farthing*, 51 Mo. 109. These decisions cannot govern proceedings in partition, the legislature having assumed to direct a different rule in such cases. A guardian *ad litem* in a partition proceeding seems to be clothed with the full powers of his ward after removal of disabilities. Sections 48 and 49 of the statute on partition reads as follows:

Sec. 48. The guardians of minors and persons of unsound mind, appointed according to law, are hereby authorized in behalf of their respective wards, to do and perform any matter or thing respecting the division of lands, tenements, or hereditaments, as herein directed, which shall be binding on such ward, and deemed as valid to every purpose as if the same had been done by such ward after his disabilities are removed.

Sec. 49. It shall be lawful for said court, for any of the purposes intended by this chapter, and before or after any proceeding by virtue thereof, to appoint a guardian for any minor, whether such minor reside in or out of this State; and such guardian, for all the purposes of this chapter, shall have the same power as any general guardian. 2 Wag. Stat., p. 973.

The 48th section seems to clothe general guardians with as full power to bind their wards in matters relating to the partition of lands, as the wards themselves would possess if their liabilities were removed. The 49th section clothes the guardian *ad litem* in partition suits with as full authority as is possessed by general guardians. I may add here that the power of a general guardian to waive proof, make admissions and conduct the defense of a minor, like any other litigant has been recognized by this court in the recent case of *Collins v. Trotter*, 81 Mo. 275.

It follows from this that the guardian *ad litem* in this suit of partition had full authority to bind his wards by

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stipulation in the nature of a waiver of proof. His conduct in doing so may be open to inquiry in a proper proceeding calling him to account for abuse of authority or breach of duty. I will say that there is no evidence of bad faith on his part as appearing in the record before us. The application for a writ of *coram nobis* was properly denied. The facts stated in the application would not justify such a proceeding. *Powell v. Gott*, 13 Mo. 458; *Latshaw v. Mc-Nees*, 50 Mo. 381.

Judgment is affirmed. All concur.

GORDON, *Trustee, et al., Appellants*, v. MADDEN.

1. **Instructions.** Instructions are properly refused which are repetitions of others already given, or are based on issues not raised by the pleadings.
2. **Pleading: STATUTE OF FRAUDS.** The statute of frauds, to be availed of as a defense, must be specially pleaded.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Belch & Silver for appellants.

E. L. King for respondent.

NORTON, J.—Omitting as much of the petition in this case as sets forth the right of plaintiffs to rent a certain farm therein described, it avers as plaintiffs' cause of action the following: "Plaintiffs state that defendant owes them \$125 for the rent of said farm commencing in the month of May, 1878, and ending in December of said year, which said sum defendant promised to pay plaintiffs." The petition then avers non-compliance by defendant with this promise to pay and asks judgment.

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The answer, after putting in issue the averments of the petition, sets up, substantially, that defendant never was a tenant of plaintiffs, but rented the premises of another person, and paid his rent. On the trial judgment was rendered for defendant, from which plaintiffs have appealed, and assign for error the action of the court in excluding evidence and in refusing and giving instructions.

From the first instruction given for plaintiffs, and the first and third given for defendant, it is evident that the court tried the case on the theory that plaintiffs' cause of action was based on the promise of defendant to pay plaintiffs, as their tenant, the amount specified in the petition for the rent of the farm for the time he was to occupy it. This was the matter averred in the petition and denied in the answer, and we are of the opinion that the court tried the case upon the correct theory. This view of it was taken by plaintiffs in the first instruction asked and given by the court, in which the question involved was fairly submitted to the jury. The second instruction asked, the refusal of which is complained of, was but a repetition of the first and was therefore properly refused. The third instruction asked presented an issue not raised by the pleadings and for that reason was rightfully refused.

We perceive no error in the action of the court in refusing to permit Mr. White, a witness, to detail a conversation between himself and McGill, as defendant was neither present nor a party to it.

The court, after having properly instructed the jury as to the issues made by the pleadings, gave an instruction for defendant, over plaintiffs' objection, to the effect that although the jury might believe that defendant promised to pay White any amount of rent due by one McGill and for which White gave McGill credit, yet unless such promise was in writing and signed by defendant he was not bound thereby. While this instruction asserted a correct abstract principle of law, still it was error to give it, inasmuch as the statute of frauds was not pleaded by defend-

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ant in his answer, it being well settled in this State that the statute of frauds to be made available at the trial must be pleaded. *Rabsuhl v. Lack*, 35 Mo. 316; *Gardner v. Armstrong*, 31 Mo. 535.

The instruction, under the facts in evidence, was calculated to mislead, and for the error in giving it the judgment will be reversed and the cause remanded. All concur.

DINWIDDIE V. JACOBS *et al.*, Appellants.

Bill of Exceptions. An entry of the record proper showing the filing, or leave of court to file, a bill of exceptions, is necessary to make it a part of the record.

Appeal from Boone Circuit Court.—HON. G. H. BURCKHARTT,
Judge.

AFFIRMED.

Turner & Douglass for appellants.

A. M. Hough and *Wellington Gordon* for respondent.

EWING, C.—This was a petition for an injunction, which upon final hearing was made perpetual against all the defendants except Francis M. Grimes, from which judgment defendants appeal to this court.

There is no entry of record showing that any bill of exceptions was filed, or signed. No order of the court is in the record, granting leave, or fixing any time to file a bill of exceptions. In what purports to be a bill of exceptions it appears that "by consent, leave is granted defendants to present their bill of exceptions to counsel for plaintiff within fifty days after this term, and that said bill of exceptions shall be filed in this court within eighty

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days after the close of this term, and when so filed, to be taken and held as filed as of the present term of this court." This is all. And this not in the record proper. No filing is marked on the bill itself, and no minute or entry on the record that it is, or was filed.

In *Pope v. Thomson*, 66 Mo. 661, it is held that: "It must appear by an entry of record, in the record proper, that the bill of exceptions was filed. Neither the indorsement of the clerk on the bill of exceptions, filed, with the day and date, (which is not done in the case at bar) nor the statement by the judge that it is signed, sealed and made part of the record, nor both, will suffice. There must be a record entry that it was filed." The same rule is laid down in *Eau Claire Lumber Co. v. Howard*, 76 Mo. 517; *McGrew v. Foster*, 66 Mo. 80.

Upon examination of the record the court seems to have had jurisdiction of the subject matter of the action, and the petition states facts sufficient to constitute a cause of action.

The judgment below is therefore affirmed. All concur.

PERSINGER V. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, *Appellant*.

- 1 **Practice:** GENERAL VERDICT: WAIVER. The objection that the verdict is a general one in a case where the petition contains two counts, each stating a separate cause of action, must be pointedly called to the attention of the trial court, or the objection is waived. It is not sufficient that the motion in arrest of judgment states that upon the record the judgment is erroneous.
2. **Railroads:** STATUTORY SIGNALS: KILLING STOCK: PRIMA FACIE CASE. Proof of failure of a railroad to ring the bell of its locomotive or to sound its whistle, as required by Revised Statutes, section 806, and of the killing of the stock, which was in a situation to escape if the signal had been given, makes a *prima facie* case against the defendant.

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Appeal from Daviess Circuit Court.—HON. J. C. HOWELL,
Judge.

AFFIRMED.

Wells H. Blodgett and George S. Grover for appellant.

The court erred in failing to instruct the jury that plaintiff could not recover on the first count, as there was no evidence connecting the failure to give the statutory signals with the injury. *Holman v. Railroad Co.*, 62 Mo. 562; *Wallace v. Railroad Co.*, 74 Mo. 597; *Braxton v. Railroad Co.*, 77 Mo. 455. As to the second count, which states an action at common law for negligence in the management of the train, even though the statutory signals were not given, yet if the engineer could not have stopped the train with safety, after he discovered the dangerous situation of the animal, he was not bound to do so. *Pryor v. Railroad Co.*, 69 Mo. 218; *Bell v. Railroad Co.*, 72 Mo. 61. The instruction given for plaintiff was erroneous, because it did not direct the attention of the jury to the different counts, or inform them on which one it authorized them to find a verdict. A general verdict upon a petition containing two or more counts, each stating a separate cause of action, is erroneous. *Mooney v. Kennett*, 19 Mo. 552; *Clark v. Railroad Co.*, 36 Mo. 202; *State v. Dulle*, 45 Mo. 271; *Brownell v. Railroad Co.*, 47 Mo. 239; *City v. Allen*, 53 Mo. 44; *Owens v. Railroad Co.*, 58 Mo. 394.

Tillehan & Brosius for respondent.

SHERWOOD, J.—Action before a justice of the peace.
Statement as follows:

“Plaintiff states that defendant is a corporation, duly organized in pursuance of law, and that on the 7th day of July, 1880, it was the owner and occupier of a certain railroad, with the cars and locomotives thereto belonging,

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known as the Wabash, St. Louis & Pacific Railroad, running from the city of St. Louis, in the State of Missouri, to the city of Omaha, in the State of Nebraska. That on said day, in Benton township, Daviess county, Missouri, the defendant, by its agents, officers and servants, while running its said locomotives and cars upon said railroad, caused the same to approach and pass over a traveled public road, being a crossing of said railroad in said township of Benton, Daviess county, Missouri, without ringing the bell of said locomotive, or sounding the steam whistle thereon, as required by section 806 of article 2, page 138 of Revised Statutes of the State of Missouri. That by reason of such neglect of defendant, its officers, agents and servants, without any fault or negligence on the part of the plaintiff, the said locomotive struck one brindle or roan cow belonging to the plaintiff and killed and wounded the same, to plaintiff's damage \$35, for which he prays judgment.

"Plaintiff further states that defendant, on or about the 7th day of July, 1880, in Benton township, in the county of Daviess, in the State of Missouri, did by its agents, servants, locomotive and railroad cars negligently and carelessly run over, maim and kill certain cattle belonging to the plaintiff, to-wit: one cow of the value of \$35, for which he asks judgment."

There was a conflict of evidence on the point whether the statutory signal was given the required distance before the train reached the crossing, and there was no evidence which connected the failure to perform the statutory duty, if there was such a failure, and the killing of the cow; nor did it appear in evidence that the allegations of the second count were supported. The court refused an instruction in the nature of a demurrer to the evidence, asked by defendant, and gave this instruction on behalf of plaintiff of which defendant makes complaint:

"If the jury believe from the evidence that the defendant, by its agents and servants, in running the train in

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question, failed to ring the bell at a distance of eighty rods from where the cow was struck and to keep said bell ringing until said train reached said crossing, or to blow the whistle eighty rods from said crossing and to sound the same at intervals until said train had crossed said public crossing, and that by reason of such negligence of said railroad company, in so failing to ring said bell or sound said whistle, defendant, by its agents and servants, struck and killed plaintiff's cow, they will find for plaintiff and assess his damage at the value of said cow."

The jury returned a general verdict for the plaintiff:

"We, the jury, find for the plaintiff, and assess his damages at \$30."

I. Defendant claims that the judgment should be arrested because there were two counts in the complaint and the verdict was general. Granting, for the moment, that this was error, still the proper advantage was not taken of it in the motion to arrest. That motion is too general in its terms. It merely states that "upon the record the judgment is erroneous." This does not pointedly call the attention of the trial court to the error now complained of, and is therefore, insufficient. *Sweet v. Maupin*, 65 Mo. 65 and cases cited.

II. Touching the point that there was no evidence connecting the failure to give the statutory signals with the death of the animals it is sufficient to say that in the opinion of a majority of the members of this court, the facts in this case bring it within the principle announced in the cases of *Turner v. R. R.*, 78 Mo. 578, and *Kendrick v. R. R.*, 81 Mo. 521.

Therefore, the judgment is affirmed. All concur.

I will express my views further in a separate opinion.

Separate Opinion.

SHERWOOD, J.—On the point of the necessity of showing connection between the failure to give the statutory

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signal, and the death of the animal, my individual opinion is that *prima facie* you have done this, whenever you have shown the neglect to give the signal and the death of the animal, and that more than this is not required.

It is not necessary, in my opinion, to show by the evidence that the animal was not tied, nor any other extraneous fact or circumstance, because your proof need never be broader than your allegations, and it will not be seriously contended that in a case like the present, you would have to allege that the animal was not in a condition to move at the time of being struck by the cars. Norton, J., concurs with me.

ROBERTS *et al.*, Appellants, v. WALKER.

1. **Petition:** ONE GOOD COUNT: PRACTICE. If either of two counts in a petition be good, the court should overrule the objection made at the trial to the introduction of any evidence because the petition fails to state a cause of action.
2. ———: FORMAL DEFECTS: PRACTICE. Where the petition states a cause of action, although defectively, or if it would be good after verdict, or on motion in arrest of judgment, defects in it cannot be reached by defendant's objecting at the trial to the introduction of evidence.
1. **Jointure:** DOWER: STATUTE. A post-nuptial contract for jointure in lieu of dower, provided for by Revised Statutes, section 2202, has no binding force on the wife until, by some act of hers after discovery, she acquiesces in or accepts the provision made for her benefit in such contract. She may, under said section 2202 renounce the jointure and have dower, but cannot claim both.
4. ———: ———. A husband and wife can agree to annul his marital rights as to personal property which came to him in her right before the married woman's act of 1875, (Acts, p. 61,) and to re-transfer it to her as a suitable provision in lieu of dower in his estate.

Appeal from Buchanan Circuit Court.—HON. J. P. GRUBB,
Judge.

REVERSED.

Heren & Son for appellants.

The petition stated a good cause of action. *Logan v. Phillips*, 18 Mo. 22; *Larrabee v. Van Alstyne*, 1 John. 307; R. S. §§ 2201, 2202, 2203; 2 Scribner on Dower, pp. 252, 383, 400; *Selleck v. Selleck*, 8 Conn. 79; *Seif v. Cordell*, 45 Mo. 345; 18 Amer. Law Reg. 202. The personal property in possession of the defendant at the time of the marriage under the uniform and well settled rule of law operated as an absolute gift to the husband of all chattels personal belonging to the wife and, also, of her chattels real, and choses in action if reduced into possession during coverture. *Tiffany & Bullard on Trusts*, p. 665; *Woodford v. Stephens*, 51 Mo. 443; *Sallee v. Arnold*, 32 Mo. 532; *Walker v. Walker*, 25 Mo. 375; *Terry v. Wilson*, 63 Mo. 493. The marriage took place in 1873, and our statute of 1875 relating to property of married women cannot apply.

W. W. Caldwell, and *Strong & Mossman* for respondent.

Under the facts stated in the first count of the petition the plaintiffs could not maintain ejectment against the defendant. "Before dower is assigned, the widow has such a possessory right in the mansion house as will defeat an action of ejectment." *Jones v. Manly*, 58 Mo. 559; *Miller v. Tolley*, 48 Mo. 503; R. S. § 2205; *Baker v. St. Louis*, 75 Mo. 671. The first count did not state facts sufficient to constitute a cause of action. *Clancy on Rights*, pp. 205, 219; *Bacon's Abridg.*, Title, Jointure and Dower; *Maguire v. Riffin*, 44 Mo. 515; *Waller v. Mardees*, 29 Mo. 25; *Couch v. Stratton*, 4 Ves. 391; *Tenny v. Tenny*, 3 Atk. 8; R. S. § 2510; *Devorse v. Snyder*, 60 Mo. 235. There is

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no averment in the petition which attempts to state that defendant had lost her rights to the property brought to the husband's house after the marriage. There being no estate or interest in the defendant as a dowress, no consideration moved from her to Walker to support the contract. There was no complete valid parol agreement entered into. *Johnson v. Johnson*, 23 Mo. 561. The estate of Walker, after his death, could only be bound by an agreement which was made and completed by Walker in his lifetime, and which was valid and binding on him. *Smarr v. Masters*, 35 Mo. 349; *Stagg v. Linnenfelser*, 59 Mo. 341; *Cape Girardeau Co. v. Harbison*, 58 Mo. 94; *Rittenhouse v. Ammerman*, 64 Mo. 200. The allegations in the petition as to the estoppel are insufficient. Bigelow on Estoppel, p. 437; *Bates v. Perry*, 51 Mo. 453; *Com. v. Moltz*, 10 Barr. 527. Plaintiffs cannot recover upon a theory adverse to that upon which the petition proceeds. *Stix v. Mathews*, 75 Mo. 96; *Bray v. Seligman*, 75 Mo. 31; *Mastin B'k v. Hammerslough*, 72 Mo. 274; *Smith v. Culligan*, 74 Mo. 387; *McKnight v. Bright*, 2 Mo. 110; *Clement v. Yeates*, 69 Mo. 625; *Cox v. Esteb*, 68 Mo. 110.

RAY, J.—This action was commenced in the Andrew circuit court, and afterwards, by change of venue, transferred to Buchanan circuit court, where it came on for trial at the October term, 1879. At the trial, on motion of the defendant, the court excluded all evidence offered by plaintiffs in support of the allegations in their petition, on the ground that said petition failed to state facts sufficient to constitute any cause of action against the defendant. The plaintiffs thereupon took a nonsuit with leave to move to set the same aside; and after an unsuccessful motion to that effect, duly excepted to, they appealed to this court. The action was brought by the plaintiffs, as the heirs at law of Joseph Walker, deceased, against the defendant, who was his widow, and the step-mother of the plaintiffs, to obtain a judgment and decree, estopping and barring her

from setting up any claim of dower to her said husband's estate, and dispossessing her of the real estate mentioned in the petition, on the ground that a post-nuptial agreement to that effect had been made and entered into between her and the deceased, prior to his death, and fully executed and performed after his death on his part, by his heirs turning over and delivering to her and her reception of the property, moneys and effects contemplated and provided for in said agreement, and in satisfaction thereof, etc.

It appears from the petition that Walker and wife, at the time of their marriage, were well advanced in life, and each had grown-up children by a former marriage, but none by the last marriage. It, also, appears that each of them, at and prior to their marriage in October, 1873, owned and possessed a considerable amount of real and personal estate, and that the defendant upon their said marriage, removed from Clay county, where she had resided, to the home of her husband in Andrew county, bringing with her some household goods and furniture of the value of \$500, or more, and, also, several head of horses and several head of cattle and one jack, all of which said Walker took possession of, had it assessed to himself and paid taxes thereon and took charge of and provided for the increase of said stock on his farm, while he lived. That said Walker never took any control, nor received any benefits or profits, in any way, from the real estate of defendant, nor of any other property of any kind, except as stated. That defendant had full control and management of her real estate and her money, sold and rented her real estate as she saw proper, and received the money and profits therefrom, and, also, loaned her money in her own name, controlled the same, collected and received the interest thereon for her own use, and for her children's benefit. That shortly after their marriage, said Walker and wife were sued on one of her debts, contracted before marriage for about \$1,500, that the husband assisted her in its payment, to the amount of \$500, which she never returned to him.

It further appears that in November, 1877, the husband, Joseph Walker, died intestate; that he was seized and possessed of real estate in said county to the amount of 396 acres; that at his death the defendant was still his wife and residing with him, and still resides in and has possession of the mansion house; that one of the plaintiffs, Joseph M. Walker, was duly appointed and qualified as administrator of said Joseph Walker, deceased. It, also, appears, that some time prior to the death of said Joseph Walker, the defendant and said Walker made and entered into a contract and agreement of and concerning their property, which is set out in the petition in this case, as hereinafter stated. The petition contained two counts, the first of which was in the nature of a bill in equity, by the heirs of Joseph Walker, deceased, against the defendant, Catharine Walker, his widow, the object of which, as before stated, was to compel her to surrender or release her dower interest in the estate of said Walker, deceased, or in other words, to estop her from claiming dower in said estate. This count, after reciting the facts hereinbefore stated, and describing the real estate so owned and possessed by the husband at the time of his death, proceeds as follows:

“That some time prior to the death of said Joseph Walker, the defendant (then the wife of said Walker) and said Joseph Walker made and entered into the following contract and agreement of and concerning their property, to-wit: That the defendant, at the death of said Walker (which was then anticipated from his complaint at no distant day) was to have all her household goods and furniture that she brought to said Walker's, of the value of \$500 or more, together with all the personal property that was brought at their marriage to said Walker's with its increase then on the farm, of the value of \$1,600 or more, together with about \$250 in accounts for services of said jack, and on getting and receiving said property, the defendant contracted and agreed to and with said Joseph

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Walker that she would claim no interest or right in any of his other property, homestead or dower, but that all his other property, real and personal, should go to his children; that she would put up no claim to any of it. That said Joseph Walker during his last sickness, in the presence of defendant and some of the plaintiffs and other persons, talked over this contract and agreement between him and his wife (the defendant) in regard to this property, so that it was well understood. That after the death of said Joseph Walker, and the appointment of said Joseph M. Walker, administrator, that the defendant claimed the said property aforesaid, and that the said administrator turned over to the said defendant all of the said property in accordance with and under the said contract and agreement as aforesaid, and that the said defendant accepted and received the same under said contract and agreement, and now has the same; that the property so turned over and received by defendant, as aforesaid, was of the value of \$2,350, and of much greater value than a dower interest in the estate of said Joseph Walker."

This first count then further charges that the defendant, after taking and accepting the property under the said contract, has failed, refused and still refuses to give possession of the mansion house, but is still holding possession of the same, and setting up claim to dower, and also refuses to surrender said property, and wholly refuses to perform her said contract and agreement with said Walker, after receiving and accepting the said property under the same. Wherefore, plaintiffs pray, from the premises aforesaid, for judgment that said defendant be estopped and barred from setting up any claim of dower to said lands aforesaid, and in the estate of said Joseph Walker, deceased, and for all proper relief.

The second count of the petition is in the nature of an action of ejectment, in the usual form, except that after describing the real estate by its numbers, it adds, "being the same lands set out and described in the first count of

plaintiffs' petition herein." Otherwise, this count is in all respects, that of an ordinary petition in ejectment for recovery of the possession of the land sued for.

Such was the petition, which the trial court, in sustaining defendant's motion to exclude plaintiffs' evidence at the trial, decided did not state facts sufficient to constitute any cause of action against the defendant. The propriety of this ruling is the only question now before us.

In the first place, we may remark, that if the first and second counts of the petition contain separate and distinct causes of action, or even but one cause of action, differently stated, and either of them be good on its face, the defendant's motion was not well taken, and should have been overruled. The second count, on its face, we think, manifestly states a good cause of action. The mere recitation, that the lands sued for are the same as those set out and described in the first count, does not necessarily imply that the right or title, on which they rely to support that count, is the same as that mentioned in the first count. The court cannot say, on such a motion, that they may not have a title other and different and paramount to that, by which their ancestor held it, in which event no valid dower right would have attached. This may not be probable, but it is by no means impossible, and it is not for the court to say upon a motion like this.

Again it is the settled rule of this court, that no mere formal objection to the petition can be taken advantage of, by motion of this sort, at the trial. If the petition states a cause of action, however defectively, or if it would be good after verdict, or on motion in arrest, then the defect or objection cannot be reached in this way. *Grove v. City of Kansas*, 75 Mo. 672 and cases cited. But waiving these questions, we proceed to consider the sufficiency of the first count or cause of action set up in the petition. Section 2201 of the R. S. of 1879 has reference to ante-nuptial contracts, which, when properly made, constitute a valid bar to dower. Section 2202 has reference mainly, to post-

nuptial contracts, which the widow, at her election, may renounce and have dower as provided by law. Section 2205 has reference to the rights of the widow to the mansion house of her husband, and the messuage or plantation thereto belonging, until dower is assessed, etc. It will be observed that the post-nuptial contract for jointure, provided for by section 2202, *supra*, whether by deed of conveyance, assurance or agreement, has no valid or binding force on the wife, until, by some act of hers, after discovery, she in some way acquiesces in or accepts the provision made for her benefit in said post-nuptial contract or agreement. Under this section the widow, at her election, may renounce the jointure and have dower; but, clearly in equity she is not entitled to both. When such provisions, thus made, are fair and reasonable, and the widow, after discovery, understandingly acquiesces in or accepts the provision thus made in lieu of dower, the authorities, we think, hold and justly hold that she will not be permitted to hold on to the jointure, so received and, also, claim dower. In cases of this sort, the question depends less upon the nature or form of the agreement, by which the jointure is attempted to be secured, than upon the subsequent acts and conduct of the widow, when she becomes discovert. It is that which imparts to the contract its vital and binding force, whatever its form. This, at least, is the view of courts of equity, in controversies of this sort. 2 Scribner on Dower, p. 238, pars. 2, 3, 4, and cases cited; *Logan v. Phillips*, 18 Mo. 22, 26, 27; *Warfield v. Castleman*, 5 T. B. Mon. 517; *Andrews v. Andrews*, 8 Conn. 79; *Selleck v. Selleck*, 8 Conn. p. 85, note (a); *Jones v. Powell*, 6 John. Chan. Rep., p. 194. To the same effect, also, is the recent case of *Garbut v. Bowling*, 81. Mo. 214.

Some questions have been made, whether, under the facts of this case, as disclosed by the petition, which, on a motion of this sort, is taken to be true, discloses any valid agreement, upon sufficient consideration, to give it effect. This objection, we think, is not well taken. The allegations

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of the petition in some particulars, are not as full and specific as they might have been, but when taken altogether and fairly construed, we think, there can be no question but that the petition would be good after verdict, or in arrest, and if so, as we have seen, the objection after pleading to the merits, could not be taken by a motion of this sort at the trial. 75 Mo. 672, *supra*. This marriage took place in October, 1873, prior to the law of 1875, and subsequent enactments, and is not affected by subsequent statutes. By the law in force at the date of marriage, all the personal property of the wife, in possession, vested absolutely in the husband. Her possession *eo instanti*, became his possession by virtue of the marriage. The title thus vesting, is not divested by his subsequently permitting her to claim, use, or manage the same. The conduct and agreement of the husband and wife, when taken altogether, shows that both parties recognized the legal rights of the husband, by virtue of the marriage, and the express object of the agreement was, at his death, to annul those rights, as to the property in question, and re-transfer them to the wife as a suitable provision for her support, in lieu of dower in his estate. This, manifestly, is the proper construction of the petition. Such was the law in force at the date of this marriage, and by it the marital rights of the husband and wife are to be determined. *Woodford v. Stephens*, 51 Mo. 443; *Sallee v. Arnold*, 32 Mo. 532; *Walker v. Walker*, 25 Mo. 367; *Terry v. Wilson*, 63 Mo. 493.

Other questions have been discussed, and other authorities cited in able briefs of counsel, but we deem them not essential to the proper disposition of this case.

For the reasons hereinbefore stated, we think the court erred in sustaining defendant's said motion, and for that reason the judgment of the circuit court is reversed and the cause remanded. All concur.

HAYS, Appellant, v. BAYLISS.

1. **Practice in Supreme Court:** REFEREE'S REPORT. The Supreme Court will not interfere with the judgment of the lower court on the finding of a referee, where the evidence taken before him has not been preserved.
2. **Evidence, Destruction of:** INFERENCE. Every inference is to be drawn against a party to a suit guilty of destroying or mutilating documentary evidence.

Appeal from Lafayette Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

J. D. Shewalter, for appellant, argued that the finding of the referee was erroneous.

Alexander Graves and *A. F. Alexander* for respondent.

It is the settled practice in the Supreme Court of this State that it will not interfere with the judgment of the court below, unless the evidence is preserved. *Bonnot v. Party*, 59 Mo. 98; *Routsonz v. Railroad Co.*, 45 Mo. 237. Since the year 1840 no finding of facts can be embraced in the judgments of inferior courts, and if embodied therein, cannot be regarded by this court on appeal. *Martin v. Martin*, 27 Mo. 227; *Brosius v. McGaugh*, 27 Mo. 330; *Gist v. Eubank*, 29 Mo. 248. The finding of the referee was right.

NORTON, J.—This suit was instituted in the circuit court of Lafayette county for the purpose of settling a partnership between plaintiff and defendant, entered into in 1869 and continuing till 1871. The petition alleges that the accounts were unsettled; avers that upon settlement a large balance was due plaintiff; and asks that an account be taken and judgment rendered for the amount claimed to be due. The answer is a general denial.

The case was referred to Mr. Blackwell with directions to take the account and report his action to the court. After taking, as stated in the report, eight hundred pages of evidence, he made his report, according to which the firm had made large profits and left plaintiff in debt to defendant in the sum of \$4,993.71. Various exceptions were filed to this report by both parties, some of which were sustained and some overruled, and resulted in a re-reference to the referee of an item of charge "to cash from daily cash sales, as per cash book, \$28,996.34," and, also, as to an item of \$9,588.79, "cash collected on accounts credited on ledger but not entered on cash book." It was contended that the latter item of charge was included in the former and for the purpose of ascertaining the correctness of this claim, the re-reference was made. The referee made his second report and found that the above charge of \$9,588.79 was included in the larger charge and in restating his account left the item out, and found that the firm had lost \$2,276.74, and that defendant was indebted to plaintiff in the sum of \$1,138.37. To this finding of the referee both plaintiff and defendant again filed exceptions, which were taken under advisement by the court till its next term, when some of the exceptions were overruled and some sustained, resulting in a modification of the statement by withdrawing the item of \$2,276.74 reported as a balance of loss and adding an item of \$3,663.93, which the court found had been omitted from the statement by the referee, which left plaintiff in defendant's debt \$693.57, for which judgment was rendered, from which plaintiff appeals and we are asked on this appeal to pass upon the questions involved, in the absence of the evidence taken by the referee.

The following extracts made from the reports of the referee, after the case had been in his hands for about two years, will suggest sufficient reasons why we decline to do so. He states that, in his investigations, he took some eight hundred pages of testimony and that after giving

the books of the partnership, as well as the evidence taken in the cause, a full and complete examination, he now reports, even after all this investigation, that it is most difficult, if not impossible to reach a correct conclusion and finding as to how the parties stand in relation to their partnership business; at least the referee doubts his ability to solve and settle the many difficult issues involved in the suit to his satisfaction. The books of the partnership and all business relating thereto were found in the utmost confusion, the books abounding in erroneous entries and being scratched, erased and defaced. From the ledger several pages containing important accounts and facts have been entirely torn, and it may be remarked as a very significant fact that four of these missing pages from the ledger contained the accounts of J. P. Triplett, who had clerked for the firm during almost its entire existence, and who figures largely in the settlement of some important issues involved in this controversy. Another difficulty to be overcome in arriving at a correct finding in this case, and the investigation thereof, is the fact that there were no written articles of partnership existing between the parties, and the testimony of the parties, plaintiff and defendant, (they being the only witnesses to the contract) is so very conflicting and contradictory that it is difficult to arrive at a correct understanding of the terms and conditions upon which the parties agreed to do business as partners. In fact neither of the parties can fix the date of the partnership or the time of the dissolution thereof; both agree, however, that the partnership commenced some time in March, 1869, and was dissolved some time in September, 1871.

The referee, in his second report which was finally acted upon by the court, says: "The magnitude and importance of the issues involved in this suit, and the settlement of this partnership warn and admonish the referee to be careful in his finding, and he regrets extremely that he cannot say when his report is made that it is susceptible

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of mathematical demonstration ; more than this, the referee reports and states, as a matter of fact, that neither he, nor any one else, be that other ever so skilled in the art and science of book-keeping, can possibly strike a correct balance between the accounts of plaintiff and defendant, because of the absence of a part of their ledger, and because of the many erroneous and unexplainable entries found on the books, as well as the conflicting oral evidence given in the cause."

When the above statements are considered, and the further fact is taken into account, that the court after some months of consideration of the report and all the evidence before it, reached the result announced in the judgment, we must decline to pass upon the questions involved, in the absence of the evidence shedding light on the partnership transactions and guiding the referee and court to the final conclusion arrived at. If with this light before them they blundered, we, being deprived of it, would be most likely to commit greater blunders. Besides this, it appears that the entire business of the partnership was in the hands and under the control of plaintiff, and from the mutilated, torn, erased, scratched condition of the books, every inference favorable to defendant should have been drawn, and drawing such an inference, had the referee charged to the firm the item of \$9,588.78, which he omitted from his second statement of account, we would not with the lights now before us have interfered with it.

Judgment affirmed, in which all concur, Judge Hough concurring in the result.

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THE STATE *ex rel.* MANSUR *et al.*, Appellants, v. KEMP.

COSTS: CHARGES AGAINST ATTORNEY: PRIVATE PROSECUTOR. Where charges, under Revised Statutes 1879, sections 488, 489, against an attorney to disbar him are set on foot and prosecuted by private persons, the costs may be properly adjudged against them on their failure to sustain the charges.

Appeal from Linn Circuit Court.—HON. HARRY LANDER,
Special Judge.

AFFIRMED.

C. H. Mansur and John E. Wait for appellants.

The proceeding was in its nature a criminal one. R. S. 1879, §§ 488, 489; 2 Hawkins P. C., p. 212; *People v. Smith*, 3 Caines 221; *In re Davies*, 9 Rep. 765; *B. & O. R. R. Co. v. Wheeling*, 13 Gratt. 40. Being a proceeding of a public and criminal character, the costs should not have been taxed against appellants. *Turner v. Com.* 2 Met. 619; *Robinson's Case*, 19 Wall. 510; *In re Paschal*, 10 Wall. 491. All statutes in reference to costs must be strictly construed. *Gordon v. Maupin*, 10 Mo. 352; *Shed v. Railroad Co.*, 67 Mo. 687. In the absence of a statute so authorizing, the court could not tax the costs against the appellants.

Clark & Collier for respondent.

MARTIN, C.—The appellants exhibited in the circuit court of Livingston county certain charges against the respondent under sections 488 and 489 of the statutes relating to the suspension and disbarment of attorneys. In the margin of the charges they entered the name of the State and county in the form of a statement of venue as follows:

STATE OF MISSOURI, }
County of Livingston } ss.

In no part of the charges does it appear that they

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were exhibited in the name of the State or county, or that the parties exhibiting them assumed to employ the name of the State or county, or to act in behalf thereof. In the affidavit made by Wait and Mansur, the parties exhibiting the charges are alluded to as relators, and the charges are also signed by Mansur & Wait as attorneys for relator. The court ordered the issue of summons but the accused waived service and appeared to the charges voluntarily. A change of venue was then taken to the circuit court of Linn county, where the charges were tried before H. Lander, special judge. Three of the five charges were abandoned before trial, and the proceedings resulted in an acquittal of the respondent upon the remaining two. After it was all over the prosecuting parties made a motion to retax costs which had been given against them in the judgment of acquittal. This motion was overruled and they appealed from the action of the court in adjudging them liable for costs.

They insist that the costs should have been taxed against the county of Livingston, for the reason that the public was interested in the proceeding which was of a quasi-criminal nature. The statute which provides for the exhibition of charges does not indicate in what name or by whose agency they shall be prosecuted; that would seem to be left to the discretion of the court. Independent of any statute, a court having the power to admit attorneys to the bar, has the power to disbar them. *State v. Laughlin*, 73 Mo. 446; *In re Bowman*, 8 Cent. L. J. 250.

It is not necessary that charges should be prosecuted in the name of the State. Neither the character of the proceedings, nor the provisions of the statute require this. *In re Bowman*, 8 Cent. L. J. 250; 7 Mo. App. 567. In this case it does not appear that these charges were exhibited or prosecuted in the name of the State. The clerk, without any order of the court to that effect, but upon his own responsibility, attached the State's name to the style of the proceeding. I will not pretend to say that charges may

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not be exhibited and prosecuted in the name of the State and in its behalf. *Turner v. Comm.*, 2 Met. (Ky.) 619. But when this is done it should appear to have been done either at the instance of the prosecuting attorney, or in compliance with an order of the court to that effect. In such case costs might properly be adjudged against the State. But, I do not conceive that any one of his own motion can set on foot such proceedings in the name of the State and burden it with the costs of failure.

The charges in this case were set on foot and prosecuted by the appellants upon their own responsibility, as I have no doubt they had a right to do, by leave of the court, which was indicated in the award of process. Having elected to prosecute in this form, I see no error in the court adjudging costs against them, upon failure to sustain the charges. Accordingly the judgment is affirmed. All concur, except Hough, C. J., absent.

SMITH *et al.* v. SHELL, *Appellant.*

1. **Sale of Goods: STATUTE OF FRAUDS: MEMORANDUM.** A memorandum of the sale of goods to be sufficient under the statute of frauds, must state the contract with reasonable certainty so that its substance will appear from the writing itself, without recourse to parol evidence.
2. **Contract: SALE: DELIVERY: MEMORANDUM.** It is not essential to the validity of such a contract that it should stipulate for any time or place of delivery of the goods, but if there be such a stipulation, the memorandum must contain it.
3. **SALE: MEMORANDUM, CONSTRUCTION of.** Where in the sale of goods the time and place of delivery are not agreed upon, the memorandum will be construed as a contract for delivery within a reasonable time and at the vendor's customary place.
4. **Contract: VARIANCE.** A plaintiff cannot recover upon a contract for the sale of goods which he testifies is not the contract made between him and the defendant, and which is one materially different

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from that alleged in his petition and evidenced by the memorandum in writing.

5. **Evidence:** OFFER OF COMPROMISE. Evidence, relating to an offer of compromise made after the controversy between the parties arose, is inadmissible.

Appeal from Audrain Circuit Court.—HON. ELIJAH ROBINSON, Judge.

REVERSED.

Ira Hall, for appellant.

The memorandum offered by plaintiffs should have been excluded. There was a fatal variance between the contract counted on and that shown by the memorandum. The latter was insufficient under the statute of frauds; its omissions cannot be supplied by parol testimony. Benjamin on Sales, (2 Ed.) § 254, p. 215; 1 Greenleaf Ev., § 268; 2 Whart. Ev., § 871; Browne Stat. Frauds, §§ 371, 371a, 376, 384, 420; Story on Sales, §§ 269, 272; Woods on Master and Servant, § 195, pp. 377, 378, and notes of cases on pp. 378, 379, (Ed. 1877). *Delventhal v. Jones*, 53 Mo. 463; *Stone v. Brown*, 63 N. Y., p. 598; *Bailey v. Ogden*, 3 Am. Dec., 509; *Lee v. Hills*, Sup. Ct. Ind., 9 Cent. Law J. 436. Even if the contract were valid under the statute of frauds, defendant was released by neglect of plaintiffs to demand and offer to pay for the corn in a reasonable time. Defendant's objections to the evidence as to value of the corn should have been sustained. Evidence as to value of the corn, should have been confined to its value in pens on defendant's farm at the time it was to be delivered. *Rickey v. Tenbroeck*, 63 Mo. 563.

Macfarlane & Trimble for respondents.

The writing was a sufficient memorandum of the contract to comply with the statute of frauds. The law does not require the contract to be reduced to writing, but

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merely that "some note or memorandum in writing be made of the bargain." R. S. 1879, § 2514; *Wiley v. Robert*, 27 Mo. 388; *Wiley v. Robert*, 31 Mo. 212; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446.

HENRY, J.—This is a suit by which plaintiffs seek to recover damages for breach of a contract for the sale and delivery of one thousand barrels of corn, alleged to have been purchased by them of the defendant. The petition alleges in substance, that on or about the 1st of November, 1879, they bought of defendant one thousand barrels of corn, a portion of which was then cribbed or penned, and the balance ungathered, for which plaintiffs were to pay \$1,035, ten of which was paid, and the balance to be paid when defendant should gather and put the balance of the corn in pens. That he agreed to gather and put it in pens within a reasonable time thereafter, in order that plaintiffs might have the same in readiness to ship and sell upon any rise in the market that might thereafter occur. Then follows allegations of the breach of said contract.

The statute of frauds was pleaded with other defences which it is unnecessary to notice specially.

The cause was tried by the court without a jury, and from a judgment in plaintiffs' favor, defendant appeals. The following is the written memorandum of the bargain relied upon by plaintiffs:

"NOVEMBER 1st, 1879.

This is to certify that I have sold to L. C. Smith and J. A. Smith 1,000 barrels of corn for the sum of one thousand and thirty-five dollars (\$1,035).

J. R. SHELL."

Lowry Smith, one of plaintiffs, testified that the corn by the agreement, was to be delivered in ten days, or two weeks. That defendant was to gather the corn and put it in pens or cribs, and to shell it at defendant's farm, where it was to be weighed.

Without detailing the evidence in relation to other

matters, we shall proceed to consider whether the memorandum taken in connection with Lowry Smith's testimony is a sufficient memorandum of the contract under the statute, which declares that:

"No contract for the sale of goods, wares and merchandise, for the price of \$30, or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract, or their agents lawfully authorized." All the authorities are agreed, that the contract must be stated with reasonable certainty, so that its substance will appear from the writing itself, without any recourse to parol evidence. Story on Sales, § 269; Browne on the Statute of Frauds, § 384; Benjamin on Sales, §§ 249, 250; Hilliard on Sales, pp. 624, 629; 1 Greenleaf's Ev., § 268. It is not essential to the validity of a contract, that it should stipulate for any time or place of delivery; but if there be such a stipulation, the memorandum must contain it. Browne on the Statute of Frauds, § 384; Benj. on Sales, §§ 209, 210, 251, 349; Story on Sales, 270. The memorandum must contain all the material terms of the contract. One exception, the only one, is that of the consideration upon which the promise is founded, allowed by most of the American, but not by the English courts. The time and place of delivery are material stipulations, in all contracts for the purchase and delivery of chattels. If the time and place had not been agreed upon, the memorandum would have been construed as a contract for delivery in a reasonable time, and at the vendor's customary place.

But when time or place is stipulated, it goes to the essence of the contract, and must appear in the memorandum. The contract so far as expressed, and so far as the law would supply terms, unexpressed, was to deliver the corn in a reasonable time.

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Plaintiff testified, in effect, that such was not the contract, but that the corn was to be delivered in ten days or two weeks. Some of the authorities, mostly English, hold that in order to show the insufficiency of the memorandum, it is competent for the defendant to prove, that a material stipulation in the contract entered into is not contained in the memorandum. Benj. on Sales, §§ 209, 249; Story on Sales, section 270. But we do not pass upon that question, on which there is a conflict between the authorities. One of plaintiffs, not called by defendant as a witness, nor on cross-examination, testified in his own behalf, that it was agreed that the corn was to be delivered within ten days or two weeks. Conceding that such testimony could not have been introduced by defendant, shall the plaintiff recover upon a contract, which he testifies is not the contract made between him and the defendant and materially different from that alleged in his petition, and evidenced by the memorandum in writing? The statute declares that no contract shall be allowed to be good * * * unless some note or memorandum in writing be made of the bargain, etc. While it might be contrary to public policy, and defeat the very purpose in view in the enactment of the law, to permit a party who signed the contract to prove by parol that there were other stipulations than those contained in the contract; yet, if the party seeking to enforce it, will voluntarily come into court and testify that the contract contained in the written memorandum is not, in fact, the contract made, it would contravene no public policy to refuse him redress for a breach of the contract, either that actually made, or the one evidenced by the written memorandum. The contract actually made cannot be enforced, because not reduced to writing, that contained in the written memorandum should not be, because the party seeking to enforce it voluntarily declares on oath, that it is not the contract the parties made.

Mr. Hilliard says: "If a written contract of sale men-

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tions no price, and it is proved by parol evidence that a price was agreed on, the writing cannot be used as evidence of the agreement between the parties." Hilliard on Sales, 232. And to the same effect, are the authorities above cited. *Boardman v. Spooner*, 13 Allen 359. If the suit is for a non-delivery of the goods sold, the plaintiff must fail in such a case; but, if sold by a written contract, and delivered, the vendor may recover in a proper suit, because the delivery and acceptance of the goods satisfies the statute. In the case at bar plaintiff sued on one contract, and was permitted to recover upon one different in its terms. Both on reason and authority, in the light of Lowry Smith's testimony, we think that the memorandum relied upon by plaintiffs is insufficient under the statute, and the defendant's second refused instruction to that effect should have been given.

The evidence introduced by plaintiffs to the effect, that in November, 1879, (whether before any controversy arose between the parties, or not, does not appear) defendant offered plaintiff \$100 to release him from the contract, was inadmissible, if made by way of compromise, after the controversy arose, and, if made before, has no tendency to prove any allegation in plaintiffs' petition. It throws no light upon the question of damages, for the defendant may have been willing to give \$100, rather than comply with the contract, on grounds other than that of a rise or fall in the market. Notwithstanding the price he was to get may have been the full market value of the corn when sold, and at the time it was to be delivered, with no prospect of a rise in the market, yet he might have been willing to give that sum of money to get rid of the trouble and worry of getting the corn ready for delivery at the time agreed upon.

The judgment is reversed and the cause remanded. Sherwood and Ray, J. J., concur. Norton, J., dissents. Hough, C. J., absent.

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HUMES V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Constitution: RAILROADS: DOUBLE DAMAGE ACT.** Section 43 of the railroad law, (Wag. Stat., p. 310,) making railroad corporations liable in double damages for stock killed by their engines and cars in consequence of failure to erect and maintain fences as therein required, is not repugnant to section 20 of article 2 of the constitution of Missouri of 1875, which declares "that no private property can be taken for private use with or without compensation, unless by the consent of the owner." Nor is it repugnant to section 53 of article 4 of that constitution which provides that "the general assembly shall not pass any local or special law * * * granting to any corporation, association or individual any special or exclusive right, privilege or immunity."
2. ———: ———. The constitutionality of the double damage act, both as regards the State and Federal constitutions, re-affirmed.
3. **Appeals from St. Louis Court of Appeals: CONSTITUTIONAL QUESTIONS: JURISDICTION.** In cases in which appeals lie from the St. Louis court of appeals, only because constitutional questions are involved, the Supreme Court has jurisdiction to consider those questions only.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Thos. J. Portis for appellant.

The statute under which this suit was instituted, and by virtue of the provisions of which the judgment was rendered is in conflict with the constitutions of Missouri and of the United States. (1) The powers of the legislature in this State are expressly limited by the constitution of 1875. Const., art. 4, § 1. The law in question violates section 20 of article 2 of the constitution, which declares "that no private property can be taken for private use with or without compensation, unless by consent of the owner." There was no such provision in the constitution of 1865. *Cooley's Const. Lim.*, (3 Ed.) 357; *Taylor v. Porter*, 4 Hill 140; *Osborn v. Hart*, 24 Wis. 91; *Bloodgood v. Railroad Co.*, 18

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Wend. 59; *Dickey v. Tennison*, 27 Mo. 374; *County Ct. v. Griswold*, 58 Mo. 193; *People v. Morris*, 13 Wend. 328; *Sadler v. Lanham*, 34 Ala. 320; *Lane v. Dorman*, 3 Scam. 288; *In re Albany Street*, 11 Wend. 149; *People v. White*, 11 Barb. 30. (2) The law involved here is, also, in conflict with article 2, section 30 of the constitution of 1875, which provides "that no person shall be deprived of life, liberty or property without due process of law. Cooley's Const. Lim., (3 Ed.) p. 352; *Hoke v. Henderson*, 4 Dev. 15; *Taylor v. Porter*, 4 Hill 140; *Jones v. Perry*, 10 Yerg. 59; *Ervine's Appeal*, 16 Pa. St. 256; *Lane v. Dorman*, 3 Scam. 238; *Reed v. Wright*, 2 Greene (Ia.) 15; *Comm. v. Byrne*, 28 Gratt. 165; *Dartmouth College v. Woodward*, 4 Wheat. 519; 4 Wheat. 235; 60 Me. 509; 2 Yerg. 260; 23 Wis. 478; 13 N. Y. 432; 5 Nev. 302; 20 Wall. 663; 6 Otto 101. (3) The law is also in conflict with article 4, section 53 of the constitution of 1875, which declares that "the general assembly shall not pass any local or special law authorizing the granting to any corporation, association or individual any special or exclusive right, privilege or immunity. *A. & N. R. R. Co. v. Baty*, 6 Cent. L. J. 148; Cooley's Const. Lim., 392; *Vanzant v. Waddell*, 2 Yerg. 260; *Ervines' Appeal*, 16 Pa. St. 266. (4) The act is unconstitutional in that if it is a penal statute, (*Barret v. Railroad Co.*, 68 Mo. 56,) the whole amount of the penalty recovered on it is diverted from the school fund to which it belongs under article 2, section 8 of the constitution. *Dutton v. Fowler*, 27 Wis. 427. (5) It is in conflict with the 14th amendment to the Federal constitution. *County of San Mateo v. Railroad Co.*, 8 Am. and Eng. R'y Cases 21; s. c., 13 Fed. Rep. 782.

T. K. Skinker, for respondent.

This cause having come to this court on constitutional questions, the court can consider no others. *Eyerman v. Blaksley*, 78 Mo. 145; *Montgomery v. Hernandez*, 12 Wheat. 129; *Udell v. Davidson*, 7 How. 769; *Rector v. Ashley*, 6

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Wall. 142; *Gibson v. Chouteau*, 8 Wall. 314. The defendant waived the right to raise the constitutional questions urged by it as to the double damage act by accepting its corporate existence thereunder. *Cooley Const. Lim.* (5 Ed.) *181, 182; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill, 468; *Baker v. Braman*, 6 Hill, 47; *Embury v. Conner*, 3 N. Y. 511; *Detmold v. Drake*, 46 N. Y. 318; *Ferguson v. Landram*, 5 Bush. 230; *Dewhurst v. Allegheny*, 95 Pa. St. 437; *Bidwell v. Pittsburg*, 85 Pa. St. 412; *Burlington v. Gilbert*, 31 Iowa, 356. The act (section 43) does not violate section 1, article 14 of the amendments to the Constitution of the United States, nor section 30, article 2, nor section 7, article 11 of the Constitution of Missouri, of 1875. *Barnett v. Railroad Co.*, 68 Mo. 58; *Cummings v. Railroad Co.*, 70 Mo. 570; *Speelman v. Railroad Co.*, 71 Mo. 434. Neither does said 43rd section violate section 20, article 2 of our present constitution. The precise point here made by appellant is that any recovery by a party injured over and above the actual damage sustained is the taking of its property for plaintiff's private use. The constitutional provision invoked cannot refer to the taking of property in satisfaction of a debt or claim for damages, for it makes the right to take it depend on the consent of the owner from which the absurd conclusion would follow that the property of a debtor or wrong-doer could not be taken, except by his consent. When the present constitution was adopted, it had become the settled policy of the State, whenever it appeared to the legislative mind to be necessary to the execution of the laws to give persons injured by their violation an action for double damages, treble damages, or damages assessed on some other basis in excess of those actually sustained. The 43rd section does not violate section 53, article 4, of the State Constitution. 1st. Because it is not a local or special law. 2nd. Because it does not grant to any corporation, association, or individual, any special or exclusive right, privilege, or immunity. *Snyder v. Warford*, 11 Mo. 517. If it named a par-

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ticular class, such as farmers, as the sole beneficiaries of its provisions, it would probably not be unconstitutional. Class legislation is not necessarily unconstitutional. If it were our mechanic's lien laws, and many others of a similar character, would have to go. *Davis v. State*, 3 Lea 380. But this section does not go even so far as this. The benefits of the provisions are open to all—even to railroad companies; for if a railroad company should own a mule, and he should be killed on the track of another company, the former could recover under this statute.

PHILIPS, C.—This is an action instituted in the circuit court of the city of St. Louis under what is popularly known as the 43d section of the general corporation law of this State, for double damages for killing plaintiff's mule on defendant's railroad. The plaintiff recovered judgment for \$135, which on motion of plaintiff was doubled by the court and judgment entered accordingly. From this judgment the defendant appealed to the court of appeals where the judgment of the lower court was affirmed *pro forma*. Defendant has brought the case here on appeal.

I. This court is invited by appellant, in a most elaborate and creditable argument, to again consider and determine the constitutionality of said 43d section. The constitutionality of this section of the statute was fully considered and affirmed in the case of *Barnett v. Railroad Co.*, 68 Mo. 56, which was followed in *Cummings v. Railroad Co.*, 70 Mo. 570. But counsel urge these decisions were under the constitution of 1865, quite unlike certain provisions of the constitution of 1875. The validity of this section under the constitution of 1875 was considered by Judge Hough in the opinion delivered by him in *Barnett v. Railroad Co.*, in so far, at least, as the validity of the law was involved in giving the penalty over and above the actual value of the animal to the owner thereof instead of to the school fund as appellant now insists should be done. So the validity of this section was directly presented under

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the constitution of 1875 in the case of *Spealman v. Railroad Co.*, 71 Mo. 434. The opinion in this last case was written by Norton, J., who was an active and prominent member of that convention. The questions presented therein for determination were the effect upon this statute of article 5 of the amendments to the constitution of the United States, which declares that "no person shall be deprived of life, liberty or property without due process of law"; also of article 14 of the Federal constitution which provides that "no State shall deprive any person of life liberty or property without due process of law;" and, also, of article 11, section 8 of the constitution of 1875 of Missouri which provided *inter alia* that "the clear proceeds of all penalties and forfeitures, etc., shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund." To his opinion from his high vantage ground, I should hesitate to oppose any antagonistic view of my own touching the points decided. By these adjudications I feel bound. No view entertained by me, if dissentient, could avail the appellant. I shall, therefore, discuss only such questions raised by the appeal as are not within the matters so adjudicated by this court.

II. It is now urged that the double liability clause of section 43 is repugnant to section 20 of article 2 of the constitution of 1875 which declares: "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner." This provision, in so many words, was not in the constitution of 1865. It is contended that so much of the damages allowed the owner of property injured by a railroad as exceeds its actual value is, in effect, taken from the company without compensation to it and against its assent. The logic of this argument literally taken, would exempt the company offending from single damages, for it receives no compensation at all where it merely destroys the property of the citizen and gives, presumably, only an enforced assent to making restitution in single damages. It would apply

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with equal force, looking alone to the literal language of the constitution, to any taking of property in satisfaction of any claim for damages. As the right to take it is made to depend on the consent of the party, the result would follow that the injured party could not recover any damage from the wrong-doer. We do not think this provision of the constitution was aimed at section 43, or its cognates to be found in the statute. We can conceive of a more rational purpose in its adoption, predicated of the history of the adjudications by the courts of this State, as well as the current history of the times developing so many devices and schemes by individuals, legislatures and municipalities to obtain private property against the owner's consent for purely private purposes. It was, for instance, early decided by this court in *Cooper v. Maupin*, 6 Mo. 624, that a right of way from necessity, from one part of claimant's land to another part of the same tract, over the land of another, could not exist. While in *Snyder v. Warford*, 11 Mo. 513, it was held that a right of way of necessity exists in all cases in which an individual owns land surrounded by other lands excluding him from any public highway, and that the legislature might provide by enactment a mode for securing such right to the individual land owner. And in *Dickey v. Tennison*, 27 Mo. 373, the court held that the legislature could not under the semblance of nominating it "An act to establish a neighborhood road in the county" evade the rule of justice that prevented the taking of private property for private use. In the course of his opinion, Judge Scott held that the constitutional recognition of the right of eminent domain for the public use gave no implication for the taking of private property for private use. So the first part of said section 20 of the constitution, in illustration of what Webster said, that "written constitutions sanctify and confirm great principles," declared that "no private property can be taken for private use with or without compensation, unless by the consent of the owner." But as if recalling the adjudications of this State,

and the great hardships under the common law limitations under some circumstances, immediately followed up the opening generality of the section with the following: "Except for private ways of necessity and, except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law." It was always the common law of the land that private property could not be taken for private use against the owner's consent. It springs from the inviolability of individual right, the encouragement to the acquisition of property by the citizen, the aim and office of every just government. So that the first part of this section of the constitution but emphasized an ancient right and universal principle, while the succeeding portion, so far from extending the operation of the rule to any new objects, enlarged the occasions for the invasion of private property for private use by permitting it under circumstances of doubtful, if not denied, right at common law.

It is among the canons for the interpretation of laws that the intention of the law-maker is often to be deduced from a view of the whole and every part of the instrument or act, taken and compared together. "The real intention, when accurately ascertained, will always prevail over the literal sense of the terms." It is true that a thing which is within the mind and intention of the framers of the law is as much within the statute as if it were within its letter; "and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." *People v. Utica Ins. Co.*, 15 John. R. 380, 381. So may the letter of the statute be enlarged or restrained according to the true intent of the framers of the law. *Whitney v. Whitney*, 14 Mass. 92, 93; *Riddick v. Governor*, 1 Mo. 147; *State v. Emerson*, 39 Mo. 80; *State v. King*, 44 Mo. 283; *Riddick v. Walsh*, 15 Mo. 519. This intention is to be taken or presumed according to what is consonant to reason and good discretion, and so as neither to embarrass the sovereign power of the State, nor lead to conse-

quences unreasonable and revolutionary. *Neehan v. Smith*, 50 Mo. 525; *State v. Pitts*, 51 Mo. 133; *Conner v. Railroad Co.*, 59 Mo. 285. It is a well known fact to the eminent lawyers and others composing the convention of 1875 that upon the statute books of this State were a large number of laws evincing the settled policy of the law-making power to give to persons injured damages in excess of the actual loss sustained, whenever and wherever it seemed necessary in the legislative mind to so do in the execution of the laws for the preservation of the public good and the better regulation of the police power. Among these are the following, furnished by the diligent counsel for plaintiff:

1. Acts which give the party injured treble damages:

For willful injury to the property of a railroad company, R. S., § 808; G. S., 1865, 342, § 41; railroad exacting illegal freight charges, §§ 835, 844; Acts 1875, p. 114, § 5, p. 118, § 14; waste by tenant for life or years, § 3107; G. S., 743, § 42; any wanton waste by tenant, § 3114; G. S., 743, § 49; certain neglects of duty by clerks of courts, § 2109; Acts 1874, p. 26, § 17; intentional trespass on real estate, § 3921; G. S. 371, § 1.

2. Acts which give the party injured double damages:

For malicious trespass on personal property, § 3928; G. S. 380, § 8, willful waste by administrator, 286; G. S. 513, § 5; evading payment of tolls on turnpike road, § 867; Acts 1868, p. 160, § 2; certain neglects of duty by recorders, § 3823; G. S. 161, § 18; same by justices of the peace, § 2847; G. S. 699, § 14; same by clerks of courts, § 2773; Acts 1868, p. 59, § 6: killing or injuring live stock trespassing where there is no fence, § 5655; G. S., p. 385, § 6; damage to live stock caused by unfenced salt-petre works, § 5668; G. S. 385 § 9; certain acts of master of a steamboat, § 4283; G. S. 760, § 59; sheriff failing to settle with his county, § 5402; G. S. 231, § 43; drover driving off another's live stock, § 5469; Acts 1868, p. 80, § 1; failure of finder of lost property to make public discov-

ery of it, § 6276; G. S. 375, § 6; unlawfully selling estray, § 7359; G. S. 390, § 29.

3. Acts which give other measures of recovery:

For steamboat taking cordwood without owner's consent, treble damages and \$20, § 4269; G. S. 758, § 45; certain trespasses on real estate, double damages and \$5, § 3922; G. S. 379, § 2; willful injury to property of a turnpike company, double damages and \$10, § 870; G. S. 347, § 19; unlawfully disclosing contents of a telegram, all special damages and \$50, § 887; G. S. 350, § 13; unlawfully refusing to enter satisfaction of a mortgage, all damages sustained and ten per cent. of the mortgage debt, §§ 3312, 3316; G. S. 619 § 15; 620, § 19; failure of constable to execute process, all damages sustained and \$10, § 2864; G. S. 702, § 24; failure of officer serving execution to account for proceeds, the full amount of proceeds with interest and damages at 5 per cent per month, § 2403; G. S. 648, § 65; neglect of tobacco inspector to perform his duties, all damages sustained and \$50, § 5857; Acts 1871, p. 82, § 5; affixing false label or trademark to merchandise, the damages sustained and \$500, § 7547; Acts 1870, p. 74, § 4; overcharge on freight by railroad company or any employe, any sum not exceeding \$1,000, including an attorney's fee, § 822; Acts 1872, p. 70, § 4; failure of railroad company to deliver consignments at elevator as ordered by consignor, or at junction or crossing of another road, full value of consignment and \$25, §§ 813, 817; Acts 1872, p. 75 §§ 4, 6.

Some of these statutes are old and historic. They are inwoven with the legislative policy of the State. They are grounded in the wisdom of experience. Their long continuance justifies the presumption that the people and their law-makers have found them preservative of the public welfare, and a shield of just protection to private property. Why, therefore, may I ask, in respect of the constitutional provision under consideration and others invoked in this appeal, should the framers of the constitution of 1875, representing as they did, the sovereignty of the whole people,

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intend by the general language employed, to sweep away all these sanctioned legislative provisions? Was there any complaint from the constituency to justify it? Any popular demand for it? Any recognized abuse or evil in their application? Is it not reasonable to assume that had it been in the mind of the framers of the constitution to strike so deep and broad into the body of the legislative branch of the state government that they would have done so by the employment of words so direct and pertinent as to have made the purpose unmistakable? Other provisions of the organic act designed to effect radical changes and eliminate existing laws from the statutes, give clear answer to these questions.

III. It is likewise contended that said section 43 is in conflict with section 53, of article 4, of the constitution of 1875. This provision is as follows: "The general assembly shall not pass any local or special law * * * granting to any corporation, association, or individual, any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track." It is argued that section 43 is special, that it "is partial and discriminates as between individuals and corporations." Is it just and correct to charge that this statute grants to any "individual any special or exclusive right privilege or immunity?" If it named any individual or preferred any particular number of citizens, and declared that they and no others might maintain the given action, it would be obnoxious to the criticism. But this right of action is given to all the people who may be thus injured. It is given as well to any association of people, and to railroad corporations whose stock may be injured by any railroad. Nor is it just or accurate to say of this statute that "it prescribes a severer punishment against a railroad corporation, owner of a railroad, than an individual owner or partnership owner." As early as 1872 (Laws of 1872, p. 69, § 2) it was enacted by the legislature that: "The term railroad corporation contained in this act shall be deemed

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and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in this state." This was the law when the appellant obtained its charter of incorporation under the general law of the State; and it is the law of the state to-day. R. S. 1879, § 825. It is further alleged against this statute that it is partial and special because it "is directed against railroads alone, while no other common carriers are brought within its operation." Had the legislature deemed it essential to the protection of human life and private property they would doubtless have extended the statute to carriers by coach and water. But as the class of property and human life, protected by this provision of the statute, is not exposed to a like peril incident to coach and water travel, the occasion and necessity for so extending the statute does not exist. Class legislation is not necessarily obnoxious to the constitution. It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all persons "who are or who may come into like situations and circumstances" is not partial. *Mayor v. Dearmon*, 2 Snead 104; *Davis v. State*, 3 Lea 379; *Snyder v. Warford*, 11 Mo. 517. As suggested by Cooper, J., in *Davis v. State*, *supra*, if the construction contended for by the learned counsel should obtain, laws giving mechanic's liens would be interdicted. And we might add, so would the act giving liens to contractors, laborers, etc., against railroads, liens of agisters and keepers of horses, inn and boarding house keepers, as also landlord's liens. This character of legislation as already shown has long prevailed in this State. The courts have repeatedly recognized and sanctioned their validity, until now it would be disruptive to outlaw them. This of course, should not deter the courts from their duty in pronouncing the judgment demanded by a strict and rigid enforcement of the mandate of the constitution, lead where it might. But when the judiciary is confronted with the question of the constitutionality of a solemn act of the legisla-

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tive branch of the government, while not shrinking from the responsibility, it should approach its consideration with cautious deliberation. The errors and oppressions of a legislative body are more readily corrected. The people are more potential through the ballot box to reach immediately the evil. The legislature lives for only two years. The process of rectifying the mischief of a misconstruction by the judiciary of the fundamental law is necessarily slow.

Therefore, and wisely, the courts before pronouncing a statute void, demand to be satisfied beyond a reasonable doubt of its vice. So this court has announced. "Both upon principle and authority the acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language and subject matter, is to be made in favor of the constitutionality of the act." *State ex. rel. v. Railroad Co.*, 48 Mo. 468; *The State v. Able*, 65 Mo. 357. Much of the vigorous argument in this case is directed against the wisdom and policy of the law in question. Some of the strictures upon the abuses it begets in practice may be just. But, as was aptly said by Cooper, J., in *Davis v. State*, *supra*: "Whether a statute is contrary to the genius of a free people is a question for the legislature, not the judge. It cannot be annulled upon supposed equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the constitution beyond its plain and obvious import."

It is urged by counsel for respondent that the appellant, having accepted its incorporation under the general corporation law of the State, including the 43d section, it is estopped from denying its validity. If the provision can be regarded as a condition proposed by the State in granting the franchise that the incorporator should pay such damage to whoever might be so injured, and defendant ac-

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cepted its charter thereunder, there is apparent force in the suggestion. But it is not necessary here to determine this question.

Counsel for the appellant have argued very extensively many imputed errors of the trial court pertaining to the sufficiency of the petition and refusal to sustain demurrer to the evidence. These questions are not before us. The amount of the judgment "in dispute" being less than \$2,500, the defendant brings the case here only on the ground that it involves "the construction of the constitution of the United States or of this State." Section 12, article 6, State Constitution. These constitutional questions we have considered. That exhausts our jurisdiction on this appeal. It follows that the judgment of the court of appeals should be affirmed. All concur. Hough, C. J., absent.

HEINZ *et al.* v. THE RAILROAD TRANSFER COMPANY, *Appellant.*

1. **Sale:** STOPPAGE IN TRANSITU. Where the vendee of goods becomes insolvent while they are *in transitu*, the vendor has the right to stop their delivery; and such right can be exercised until actual delivery to the vendee, or circumstances equivalent thereto.
2. ———: ———, Such right of stoppage *in transitu* exists, although the sale be conditional or on credit.

Appeal from Jackson Special Law and Equity Court.—HON.
R. E. COWAN, Judge.

REVERSED.

Chase & Powell for appellant.

Plaintiffs' instructions were erroneous in that they ignored the question of the delivery of the goods to the purchasers. The goods had been sold on time and deliv

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ered to the consignee, the *transitus* was ended prior to the commencement of the suit, and the vendor's right was then gone, and they should not have recovered. *Sawyer v. Joslin*, 20 Vt. 172; *Connors v. Transportation Co.*, 6 Am. Law Reg. 214; *Pequer v. Taylor*, 38 Barb. 371; *Clark v. Masters*, 1 Bosw. 177; Benjamin on Sales, §§ 822, 840, 841, 846, 851; *Keeler v. Goodwin*, 111 Mass. 490; *Cooper v. Bild*, 3 H. & C. 722. Where special property remains in a common carrier till freight is paid, the possession of the vendee is then complete, and the right to stop *in transitu* is ended. *Crawshay v. Eads*, 1 B. & C. 181; *Foster v. Fowler*, 6 B. & C. 10; *Richardson v. Gros*, 3 Bosanq. & Pul. 118. The goods were not only delivered to the consignees, but were by the latter pledged for an existing debt before beginning of this suit. Appellants were innocent purchasers for value, and plaintiffs could not recover. *M. C. R. R. Co. v. Phillips*, 60 Ill. 190; *O. & M. R. R. Co. v. Kerr*, 49 Ill. 459; 13 I. 610; 21 Ill. 330; 32 Ill. 425; 40 Ill. 321. What amounts to a delivery of goods when the facts are admitted, is a question of law. *Williams v. Erans*, 39 Mo. 206; *Hatch v. Bagby*, 12 Cush. 29; *Ober v. Carsons*, 63 Mo. 214; *S. W. F., etc., Press Co. v. Stanard*, 44 Mo. 71. The verdict is against the overwhelming weight of evidence, and should have been set aside by the trial court.

Lathrop & Smith for respondents.

This court will not reverse a cause, even if it believes the verdict is against the weight of evidence. *Penn v. Lewis*, 12 Mo. 161; *Price v. Evans*, 49 Mo. 396; *Rea v. Ferguson*, 72 Mo. 225; *Grove v. City of Kansas*, 75 Mo. 672. The instructions, if anything, are too favorable to defendant *Adams v. Clark*, 9 Cush. 215; *Donath v. Broomhead*, 7 Pa. St. 301; *Newhall v. Vargas*, 13 Me. 93; *Mohr v. Railroad Co.*, 106 Mass. 67. The right of the plaintiffs to recover in this case can be sustained under the evidence upon the ground of a rescission of the contract.

SHERWOOD, J.—Action for damages because of the conversion of a small lot of goods. The goods were shipped from Buffalo, N. Y., to Strayer & Butler, of Kansas City, on the 22nd of February, 1878, and arrived at the depot in Kansas City on March 5th of that year, and were taken away from the depot on or about that day, though it does not definitely appear just when they were removed from the depot. The controlling question in this case is, whether a conversion of the goods in controversy, by the defendant company, has occurred and this question hinges upon another, to-wit: whether a delivery of the goods took place prior to their being demanded by the plaintiffs from the defendant company. The goods in the store of Strayer & Butler were attached on February 21st, 1878, and by successive attachments within a few days thereafter. On the 30th of April, 1878, the plaintiffs at Buffalo, N. Y., received from Strayer & Butler the following postal card:

“Gents:—Suppose you have heard of our failure and would not wish us to receive your goods at our depot. Please give us directions by return mail and much oblige,

Yours truly,

STRAYER & B.

Kansas City, Mo., 3-30, '78.

Pr. Strayer.”

And on April 29th, 1878, the plaintiffs also received from the defendant company the following letter:

“OFFICE OF R. R. TRANSFER Co., 120 & 122 W. Third St., }
Kansas City, Mo., April 27th. }

MESSRS. HEINZ, PREECE & M.

Gents:—Sometime ago you shipped two boxes to Strayer & Butler, of this City. Before their arrival the firm were closed by attachment. As I had claims on them amounting to \$17 I attached the two boxes shipped by you for freight. The drayage on the boxes is \$2.80, making a total of \$19.80. I will reship your goods on payment of the above amount. You can either send a draft, or I

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will ship and put the amount on back charges on your giving a guarantee that the amount will be paid on arrival of the goods.

Yours Respy.

WM. W. BROWN, Supt."

This case involves the right of stoppage *in transitu*, which, of course, is based on the insolvency of the buyer. The vice of the instructions, given on behalf of the plaintiffs, consists in this, that they wholly ignore the question of whether the transit was at an end and the goods delivered. This right had its origin in courts of equity, and is based on that very obvious principle of justice and equity that one man's goods should not be applied to the payment of another man's debts. *D'Aquila v. Lambert*, 2 Edw. 77 S. C. Amb. 399.

"The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it; that is to say from the time the vendor has so far made delivery that his right of retaining the goods and his right of lien, * * are gone, to the time when the goods have reached the actual possession of the buyer." "The stoppage *in transitu* is called into existence for the vendor's benefit after the buyer has acquired title and right of possession and even constructive possession but not yet actual possession." 2 Benj. on Sales, pp. 1069, 1070. "Until the delivery is actual and absolute, the seller may suspend it and invoke the authority of any intermediary to effect it." And the insolvency of the purchaser is a sufficient justification for exercising the seller's right, though the sale be unconditional and time be given the purchaser. *Keeler v. Goodwin*, 111 Mass. 490, and cas. cit. Chancellor Kent says the right of the seller to stop the goods "will continue until the place of delivery be in fact the end of the journey of the goods and they have arrived to the possession or under the direction of the vendee himself." 2 Kent Com., 544. And other authorities hold that the *transitus* is not at an end "until the goods have come to the actual possession of the

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vendee, or circumstances equivalent thereto." *Buckley v. Furniss*, 15 Wend. 137; *Covell v. Hitchcock*, 23 Wend. 611; *Edwards v. Buwer*, 2 N. & W. 375. In this case it is exceedingly doubtful whether there was any delivery of the goods, actual and absolute, or circumstances equivalent thereto. It strikes one on reading the evidence showing the manner in which the goods were received, the lids of the boxes turned over so as to hide the name of the consignees, and the shifting of the goods about from place to place in a clandestine manner, that the delivery of the goods, other than a mere colorable one, has never occurred. It is urged that the judgment may be affirmed on the ground of the rescission of the contract. But the cause was not tried on this theory, and no instructions given with that view. Besides if a delivery occurred it may have been prior to the rescission.

For the error in failing to instruct the jury on the point of delivery and its incidents, the judgment should be reversed and the cause remanded. All concur.

MEYERS V. THE UNION TRUST COMPANY *et al.*, Appellants.

1. **Pleading:** RAILROADS: DOUBLE DAMAGES. A petition, in an action against a railroad under Revised Statutes, section 809, for double damages for killing stock, need not negative the fact that the place at which the animal entered upon the track was within the limits of an incorporated town or city.
2. **Railroads:** KILLING STOCK: CREDIBILITY OF WITNESS. Where in such action, there are facts in evidence from which the jury may reasonably infer that the injury to the animal was caused by collision with defendant's locomotive, it should not be instructed that the plaintiff could not recover, although the engineer in charge of the locomotive testified for defendant, without being directly contradicted by any other witness, that he saw the animal when it was hurt, and that it ran on to a trestle and jumped therefrom in front of the locomotive, and was not touched by the latter, or by

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any of defendant's cars. It was for the jury to determine the credibility to be given to the engineer's testimony

3. **Double Damage Act:** CONSTITUTIONALITY OF. The decision in the case of *Hume v. The Missouri Pacific R'y Co.*, ante, p. 221, affirming the constitutionality of the double damage act, in respect to both State and Federal constitutions, adhered to.

Appeal from Moberly Court of Common Pleas.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

Thomas J. Portis for appellants.

To entitle plaintiff to a judgment for double damages under section 809, he must both allege in his petition and prove that the point at which his animal came on to the railroad or right of way, was not within the corporate limits of any town or city. In this case there being no such allegation in the petition, and no proof of this fact, plaintiff was not entitled to recover. *Rowland v. Railway Co.*, 73 Mo. 619; *Schulte v. Railway Co.*, 76 Mo. 328. Also that the injuries were the result of a direct and actual collision of the engine or cars, with the animal injured. *Lafferty v. Railroad Co.*, 44 Mo. 291; *Hughes v. Railroad Co.*, 66 Mo. 325. *Seibert v. Railway Co.*, 72 Mo. 565. For these reasons the declaration of law asked by defendants should have been given, and the motion for a new trial should have been sustained. The statute under which this action was brought and prosecuted is in conflict with the provisions of the State and Federal constitutions.

Hollis & Wiley for respondent.

PHILIPS, C.—This is an action instituted in the common pleas court of Moberly, Randolph county, to recover damages for the killing by defendant, a railroad corporation, of plaintiff's colt. The action is based on section 809 Revised Statutes. The petition is in proper form and alleges

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the killing to have occurred on the 29th day of May, 1880. The answer tendered the general issue.

The plaintiff, to sustain the issues on his part, testified "that he was the owner of the animal sued for in the petition, and that at the time of the killing she was of the value of \$60, and that the said animal got upon the track of defendant at a point where the same was not fenced and not at a public road crossing. Found the mare or colt lying at one end of a trestle work on defendants' road, down in a branch. Don't know how she got there or how she was hurt."

W. J. Shause, witness for plaintiff, testified: "That he saw the animal lying over in the branch at one end of the trestle work the morning after she was thrown there (or) had fallen there. Could see her tracks on defendants' road going in the direction of the trestle. She seemed to check up just as she reached the trestle work, and her hind feet seemed to have gone between the ties just at the end of the trestle work on the opposite end from where she was lying when I found her. The trestle was about twenty-six or twenty-seven feet long. I saw hair on the ends of the screws joining the rails together on the end of the trestle work to which she must have first come, but no other marks on the trestle until on the opposite end of the trestle, where she seemed to jump off or was thrown off against some willow stubs, on which there was hair. There were no tracks of the animal on the side of the trestle where we found the animal. The first and only evidence of her striking was on the stubs where she seemed to have lighted on her side, on the south side of the railroad track outside. The animal was not dead when I first saw her. She had no bones broken. On the inside of her hind leg, above the second joint, or hock, the hair was scraped off about eight inches, as though something had struck her between the hind legs—a cow catcher or something of that sort. Appraised the animal at \$60."

Wm. Guin, another witness for plaintiff, testified to

substantially the same as the previous witness. The plaintiff here rested his case.

The defendants, to sustain the issues on their part, offered James Russell, who testified: "That he saw the animal sued for by plaintiff at the time she was hurt. He was an engineer on defendants' road running an engine. The animal, when he first saw her, was running in front of an engine that was in his charge at the time, and when she came to the trestle referred to, ran on to it, and jumped or ran across it diagonally and jumped off down into the branch. The engine was at no time nearer than fifty feet to the animal, and she was not struck or touched by the engine or cars."

The defendant at the conclusion of the evidence asked the court to declare: "That under the pleadings and evidence the plaintiff is not entitled to recover." The court refused this instruction and found the issues for the plaintiff and entered up judgment on motion of plaintiff for double the ascertained value of the colt. Defendant after ineffectual motions for new trial, and in arrest has brought the case here on appeal.

I. The first objection urged by defendant against the verdict and judgment in this case is, that the petition and evidence do not negative the fact that the point of injury and that at which the colt entered upon the railroad track may have been within the limits of an incorporated town or city. The petition distinctly avers that the said points are where the railroad "passes through, along or adjoining inclosed or cultivated fields or uninclosed lands," and that the action is brought under section 809, etc. This it has been repeatedly held is sufficient. If in fact the point was where the defendant was under no legal obligation to so fence, after the plaintiff has made the proof shown in this record, the defendant should make proof of the exculpatory fact. *Farrell v. Union Trust Co.*, 77 Mo. 475; *Jackson v. St. L., I. M. & S. R. R. Co.*, 80 Mo. 147, and cases

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cited; *Wayman v. H. & St. J. R. R. Co.*, decided last October term, and other cases.

II. It is next insisted that on the evidence the court should have given the instruction asked by defendant, in the nature of a demurrer to the evidence. At the close of plaintiff's evidence there were facts from which the court or jury might have reasonably inferred that the injury was produced by collision with the defendants' locomotive. Such inferences from a given fact or facts established by evidence are peculiarly within the province of the jury, and its finding is conclusive on this court.

The defendant demurred to the evidence after introducing the testimony of its engineer. As a matter of course, if the testimony of the engineer should be credited the finding should have been for the defendant. But it was for the jury, or court sitting as a jury, and not this court, to determine whether the testimony of any witness should be credited. With that discretion of the triers of the facts, in absence of passion or misconduct, we cannot interfere. See *Gregory v. Chambers*, 78 Mo. 294, and authorities cited and reviewed.

III. We are asked in this case to reconsider and determine the constitutionality of the double liability clause of said section 809 of the statute. This question has been fully considered and decided at this term in the case of *Humes v. Mo. P. R'y Co.*, ante, p. 221, affirming the constitutionality of the statute. To that decision we adhere.

It follows that the judgment of the court of common pleas should be affirmed. All concur.

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THE SOUTHWORTH COMPANY, *Appellant*, v. LAMB.

1. **Pleading: MISJOINDER: WAIVER.** Actions *ex contractu* and *ex delicto* cannot be united under the code in the same petition, but the misjoinder must be taken advantage of before verdict. A motion at the close of plaintiff's evidence to compel him to elect, is not too late.
2. **Pledge.** A pledgee without a special agreement to that effect, cannot retain the property pledged for any other debt than that for which the pledge was specifically made.
3. **Trover: OWNERSHIP.** Plaintiff in an action for trover and conversion must show either general or special property in the thing converted.
4. **Pledge: PAWNOR'S INTEREST, SALE OF: TROVER.** The pawnor of a chattel, notwithstanding his pledge, has still a vendible interest in it, and the vendee of such interest can maintain trover against the pawnee, if the latter refuses to deliver it to him on his tendering the amount of the debt.

Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

REVERSED.

Smith & Krauthoff for appellant.

The court erred in requiring plaintiff to elect. When irrelevant or redundant matter is inserted in a pleading, the remedy is to strike out the same by motion, or where the allegations are indefinite and uncertain, the court may require the pleading to be made definite and certain. *O'Connor v. Koch*, 56 Mo. 253; R. S. 1879, §§ 3529, 3530. Even where the practice to compel an election prevails, it is done on notice to adverse party and before answer. *Wilson v. Cleveland*, 30 Cal. 192. The court erred in sustaining the demurrer to the evidence. *Wilson v. Board of Education*, 63 Mo. 167; *Buesching v. Gaslight Co.*, 73 Mo. 219. It was the legal duty of defendant, when his debt was paid, to deliver up the securities given and pledged for the payment to the said W. & E. P. & L. Co., or its assignee. *Welton v. Hull*, 50 Mo. 296. The principles of law governing the

application of payments, as laid down in the authorities, can have no pertinency here. *McCune v. Bell*, 45 Mo. 174; *Waterman v. Younger*, 49 Mo. 413; *Gatner v. Kemper*, 58 Mo. 567.

John T. Redd for respondent.

1. To maintain trover for the conversion of a chattel, plaintiff must have a title, general or special, to the property. *Bertholf v. Quinlan*, 68 Ill. 297; *Barton v. Dunning*, 6 Blackf. 209. *Kemp v. Thompson*, 17 Ala. 9; *Hickock v. Buck*, 22. Verm. 149; *Swift v. Monley*, 10 Vt. 208. 2. He must also show an immediate right to the possession. *Owen v. Knight*, 4 Bing. (N. C.) 54; *Clark v. Draper*, 19 N. H. 419; *Burton v. Tannchill*, 6 Blackf. 470. 3. To maintain trover for a chattel, plaintiff must show, 1st, That he is the owner of the chattel (general or special). 2nd, That he has the immediate right to the possession; and 3rd, A conversion by defendant. *Ayers v. French*, 41 Conn. 150; *Shoorz v. Pickens*, 10 Ind; *Zimmerman v. Bank*, 35 Wis. 368. 4. There was no evidence tending to show any ownership, general or special, of the bonds and warrants in plaintiff. If there had been, it was the duty of plaintiff to call the attention of the court below to any portion of the evidence relied on as tending to show title. This appellant did not do or attempt to do. Rules 9 and 10 of this court. 5. The delivery of the bonds and warrants to the respondent, Lamb, by the Winchell & Ebert Printing & Lithographing Company, to be held as collateral security for the \$5,000 note, constituted a pledge, vesting in respondent a qualified ownership as bailee, leaving the general ownership in the Winchell & Ebert Printing & Lithographing Company, the debtor. "The pignus or pledge is where anything is obligated for money, and the possession is passed to the creditor." 5 Bacon's Abmt., (1 Am. from 6 Eng. Ed.) Title Mort. a, p. 2; *Barrow v. Poxton*, 5 John. 261. A pawn differs from a mortgage in two important

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particulars, viz: 1st, In a pawn, the legal title or ownership continues in the debtor, pawnor; in a mortgage, the legal title or ownership passes and vests in the creditor, mortgagee. 2nd, A mortgage of a chattel is sometimes valid without the delivery of the possession (as in the case of our recording acts). It is otherwise as to a pawn. *Gleason v. Drew*, 9 Greenl. 82; *Ward v. Summer*, 5 Pick 60; *Haven v. Low*, 2 N. H. 13; *Brown v. Bemont*, 8 John. R. 97; *McLean v. Walker*, 10 John. R. 471. A contract of pledge is a contract *in rem*, where the delivery of the thing pledged is not the consequence of the contract, but the very essence of it. *Lee v. Bradley*, 8 Mar (La.) Rep. 57; *Burrow v. Poxton*, 5 John. 261; 6 East 261; 1 Pick. 607; 1 Caines Cases 200. The appellant had no common law or statutory lien on the bonds and warrants by virtue of the agreement between the appellant and the W. & E. Print. & Lith. Co. *Moss v. Townsend*, 1 Balstrode 207; *Hamlet v. Tallman*, 30 Ark. 505; *McCoffey v. Wooden*, 60 N. Y. 459; 7 Wait's Defenses 215; 6 East 27. The bonds and warrants having been pledged to respondent for the payment of the \$5,000 note, he had the right to hold them for payment of his two notes executed by the pledgor for \$716.75. *Demainbray v. Metcalf*, 2 Taunt. 691; 5 Bacon's Abridg., 80; *Jarvis v. Rodgers*, 15 Mass. 407.

EWING, C.—This suit was commenced in the Hannibal court of common pleas upon facts or allegations substantially as follows: In December, 1872, the Winchell & Ebert Printing & Lithographing Company, a Missouri corporation, made and delivered its note to the National Insurance Company, also a Missouri corporation, for \$5,000 bearing ten per cent interest, and to secure its payment executed and delivered a deed of trust on certain property, conveying it to W. C. Foreman, as trustee. On July 1st, 1874, this \$5,000 note was bought by Alfred W. Lamb, the defendant herein, who on July 3rd following executed in duplicate the following contract in writing to-wit:

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"HANNIBAL, Mo., July 3, 1874.

"This certifies that the Winchell & Ebert Printing & Lithographing Company has deposited with me as collateral security for the payment of their note for \$5,000 dated Dec. 17, 1872, and assigned to me by the National Insurance Company, of Hannibal, Mo., (the payment of which is extended to July 1st, 1875), the following described county warrants and bonds issued by the several counties named in the state of Missouri to-wit:" (Here follows the list of warrants and bonds.)

"The said note for \$5,000 is hereby extended in time of payment until July 1st, 1875, with interest on \$5,000 from July 1st, 1874. And when said note is paid in full, the foregoing bonds and warrants shall be returned to said Winchell & Ebert Printing & Lithographing Company, or their value accounted for by me. I reserve the right to sell said collaterals at any time before maturity of said note, at such price as may be agreed to by said Winchell & Ebert Printing & Lithographing Company, the proceeds of such sale to be applied at time of sale on said note, and if said note be not paid at maturity, then I reserve the right and am fully authorized to sell said collaterals at public sale, on ten days' notice, published in some paper in Hannibal, Mo., or by three written or printed hand-bills posted in three public places in said city, applying the proceeds first to the payment of costs of sale, and next toward payment of said note. And the said Winchell & Ebert Printing & Lithographing Company shall bear all the expenses connected with negotiating the sale of or collecting said county warrants and bonds, and they shall use every reasonable effort to sell or collect said warrants and bonds before the date of maturity of said note (July 1st, 1875.)

A. W. LAMB.

"Signed in duplicate, this 1st day of July, 1874.

THE WINCHELL & EBERT P. & L. Co.,

By J. R. Winchell, P't."

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It is then alleged that these collaterals are of the value of \$2,928.85. The five thousand dollar note becoming due and being unpaid, it is alleged that plaintiff, a Massachusetts corporation, contracted to loan, and did loan to the Winchell & E. P. & L. Co. \$20,000 upon condition that the said W. & E. P. & L. Co. should, out of the proceeds, pay off the Lamb \$5,000 note, and transfer to plaintiff as security the collateral held by Lamb under the contract above set out, and a deed of trust on certain other property which is not material to refer to in this case. That this \$20,000 note was made and delivered in November, 1875. Made the deed of trust and transferred the above named collaterals, and that Lamb had notice of and consented to said agreement. That in December, 1875, Lamb acknowledged the payment of the \$5,000 note and released the deed of trust, but refused to deliver up the collaterals. That afterwards plaintiff foreclosed its deed of trust, applied the proceeds to the \$20,000 loan which left due and unpaid thereof about \$10,000. That the W. & E. P. & L. Co. was insolvent, and that Lamb refused to deliver said bonds and warrants to plaintiff on demand, but, on the contrary, has converted them to his own use, wherefore plaintiff prays judgment for damages in the sum of \$2,928.85.

The defendant answering said that long before the warrants and bonds were assigned to him the W. & E. P. & L. Co. owed him money for which he sued in May, 1877, and had judgment for \$1,905.50. That at and prior to the payment of the balance of the \$5,000 note he notified the W. & E. P. & L. Co. that he would hold the collaterals until that judgment was paid off. That part of said bonds and warrants were sold with the consent of the said printing company, and the proceeds applied to the payment of the \$5,000 note; that some of them were returned to said W. & E. P. & L. Co., and that some of them amounting to \$620.57 were collected by him and applied to the payment of the unsecured indebtedness due him from said printing company, at which time he had no notice of any transfer of

said securities to plaintiff. The replication denied the new matter set up in the answer.

At the close of the evidence offered by plaintiff the defendant filed his motion asking the court to require plaintiff to elect upon which allegations in the petition it would stand. Whether upon the ground that defendant by the writing, pledging the collaterals for the payment of the \$5,000 note, and by which they were to be redelivered to the W. & E. P. & L. Co. when that note was paid; or upon the ground that the plaintiff was the owner and defendant had wrongfully converted them to his own use. This motion was sustained. The plaintiff elected to stand on the count for conversion, and thereupon defendant demurred to the evidence which was sustained, and there was a verdict and judgment for the defendant.

I. The petition evidently undertook to state two different causes of action. One upon the theory that when the county bonds and warrants were delivered to Lamb as collateral for the payment of the \$5,000 note he entered into a written contract to return the same when the note should be paid; that the collaterals had thereafter been sold and assigned to the plaintiff and that Lamb was bound under this written contract to return them. The other theory was that plaintiff was the owner who demanded the delivery of the collaterals, and that the defendant refused and converted them to his own use. This is evidently a misjoinder of causes of action. It is uniting in the same petition an action *ex delicto* with an action *ex contractu*, which is not permitted by the statutes. R. S. 1879 § 3512; *Jamison v. Copher*, 35 Mo. 483; *Ederlin v. Judge*, 36 Mo. 351. This might have been taken advantage of by demurrer. R. S. 1879, § 3515. In *House v. Lowell*, 45 Mo. 383, treating of this subject, Judge Bliss said "to give the statute a construction that, in a case where the plaintiff has alleged real grievances, and where the court has authority to redress them, shall permit the defendant to lie by, go to trial upon the merits, accumulate costs, and, if defeated ar-

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rest the judgment because the petition contains too many grievances, or is informally constructed, would make pleadings but a trap for the unwary, and defeat the great end of the code. But this was not a motion in arrest, after verdict, but a motion bringing to the attention of the court the fact that two improper causes of action were joined in the petition. This amounted to a demurrer, and, although coming a little late was properly sustained. It was filed after hearing plaintiff's evidence, and was thus more favorable to plaintiff by developing the facts upon which a verdict must be based before electing upon which cause of action to stand. If filed after the verdict it would undoubtedly have been too late, and would have waived the defect; but coming as it did, after hearing only plaintiff's evidence and before the case was submitted to the jury it should have been sustained.

II. After the motion to elect was sustained the defendant demurred to the evidence which was sustained. In this we think the circuit court erred. The plaintiff's evidence tended to show that the county bonds and warrants were pledged to the defendant by the W. & E. P. & L. Co. for a specific purpose to-wit: "has deposited with me as collateral security, for the payment of their note for \$5,000," etc., "and when said note is paid in full the foregoing bonds and warrants shall be returned to the said Winchell & Ebert Printing and Lithographing Company, or their value accounted for by me." This is an extract from the written agreement between the W. & E. P. & L. Co. and the defendant when the collaterals were pledged. It, also, tended to prove that the \$5,000 note was fully paid off and that the W. & E. P. & L. Co. had sold, transferred and assigned said collaterals to the plaintiff.

III. Here it would seem the object of the pledge had been performed. The note was paid. The pledge in the absence of any different agreement between the parties being performed, ceased to be operative and the whole beneficial interest became absolute in the hands of the

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true owner. *Ward v. Ward*, 37 Mich. 253. Independent of a special agreement for any other debt than that for which the pledge is specifically made the pledgee cannot retain the pledge; 2 Kent, top p. 761 (8th Ed.); *Jarvis v. Rogers*, 15 Mass. 369; *Tutonia National Bank of New Orleans, v. Loeb & Co.*, 27 La. An. 110; but must deliver it when his lien is extinguished. In Story on Bailments it is said: "Indeed the whole doctrine of extinguishment is resolvable into the first elements of justice, and is founded upon the express or implied intention of the parties to extinguish the pledge, or upon a virtual extinguishment by the operation of law." §§ 365, 361, 359; Schouler on Bailments, 233.

IV. To maintain this action it was necessary for the plaintiff to establish the fact of general or special property in the thing converted. 68 Ill. 297. This we think the evidence tended to prove, and if it did establish ownership, then the plaintiff had the right to sue in trover. In *Franklin v. Neate*, 13 Mees. and Wels. 480, it was held: "The pawner of a chattel still retains his property in it (though qualified by the right of the pawnee) which he has a right to sell and by the sale to transfer that property to the buyer; and if the pawnee on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it." *Hunt v. Holton*, 13 Pick. 216; *McLean v. Walker*, 10 Johns. 471; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540. In this case the plaintiff if it can recover at all could only recover upon such of said collaterals (county bonds and warrants) as had not been sold and the proceeds applied to the payment of the \$5,000 note, or such as had not been returned to the W. & E. P. & L. Co. before the defendant had received notice of their sale and transfer or bailment to the plaintiff. In other words, the defendant had the right to sell any or all of said securities and apply their proceeds to the payment of the \$5,000 note. He, also, had the right, before he was notified that the W. & E. P. & L. Co. had assigned them to plaintiff to return them

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to the W. & E. P. & L. Co. And all such as were not so sold and appropriated and all such as were not so delivered to the W. & E. P. & L. Co. the plaintiff may recover, if the facts justify it.

V. The court excluded from the consideration of the jury three letters written by Winchell, the president of the W. & E. P. & L. Co. to Wells Southworth, president of the plaintiff. These letters were wholly immaterial. It was only necessary to show that the collateral securities in controversy had been sold, assigned or pledged to the plaintiff, and they were very properly excluded. The judgment below is reversed and the cause remanded. All concur. Hough, C. J., absent.

ANDERSON, *Appellant*, v. SHOCKLEY.

1. **Equity:** STATUTE OF FRAUDS: SPECIFIC PERFORMANCE. Where one in pursuance of and on the faith of an oral promise of the owner that he shall have a deed for land, enters into possession and makes valuable improvements, the case is taken out of the statute of frauds, and he is entitled to a decree for specific performance.
2. **Evidence:** IMMATERIAL ERROR. The admission of irrelevant evidence in a trial by the court, is no ground for the reversal of a judgment, where it appears that without regard to such evidence it was for the right party, and that a new trial would not change the result.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

AFFIRMED.

Allen H. Vories for appellant.

The court below erred in permitting any evidence on the part of defendant as to the number of plaintiff's chil-

dren and the amount of property owned by him, there being nothing in the issues making such evidence relevant or competent. As the defendant sought specific performance of the contract set up in his answer, the burden of proof was on him to make out his case. To entitle a party to a specific performance, it must be so precise and exact in its terms that neither party could reasonably misunderstand them, and these terms must be satisfactorily established by the evidence, and be clear, definite and unequivocal in its terms, especially where the contract is verbal. *Taylor v. Williams*, 45 Mo. 80; *Underwood v. Underwood*, 48 Mo. 527; *Johnson v. Quarles*, 46 Mo. 423; *Stevenson v. Adams*, 50 Mo. 475; *Tiernan v. Granger*, 65 Ill. 351; *Lobdell v. Lobdell*, 36 N. Y. 327. Where there is a conflict in the understanding of the parties alleged to be contracting, a court of equity will not enforce specific performance. *Boreman v. Cunningham*, 78 Ill. 48; *Wiley v. Roberts*, 31 Mo. 212. The evidence of a parol gift, or sale of lands between parents and children must be very clear to avoid the statute. *Cox v. Cox*, 26 Penn. St. 375; *Williamson v. Williamson*, 4 Iowa 279; *Johnston v. Johnston*, 19 Iowa 74; *Wright v. Wright*, 31 Mich. 380; *Sitton, etc., v. Shipp and others*, 65 Mo. 297; 5 Wait's Actions and Defenses, 826, § 3. There was no promise or agreement in writing between the parties, and no such part performance as takes the case out of the statute. *Hager v. Hager*, 71 Mo. 610; *Allen v. Webb*, 64 Ill. 342. The most that can be said of this case is the fact that plaintiff intended at some future time on certain conditions to give the land to defendant. There was no consideration for his promise. Courts of equity do not decree specific performance of a mere voluntary agreement, nor promises founded on benevolent intentions. *Darlington v. McCoolle*, 1 Leigh (Va.) 36; *Estate of Webb*, 49 Cal. 542; *Hanson v. Nicholson*, 19 Wis. 498; *Mercer v. Stark*, 1 Wis. (Walker) 451. There was no mutuality in the alleged contract. Plaintiff could not have sued defendant for specific performance. *Bodine v. Glading*, 21 Pa. St. 50; *Ohio v. Baum*, 6 Ohio

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383; *Lust v. Deitz*, 46 Iowa 205; *Hills v. Croll*, 2 Phil. Ch. 62; *Kimberly v. Jennings*, 6 Sim. 340.

Strong & Mosman and *Tutt* for respondent.

The court committed no prejudicial errors against appellant in admitting evidence, as urged by him. *Garesche v. College*, 76 Mo. 332; *Carpenter v. Rynders*, 52 Mo. 278; *Gimbel v. Pignero*, 62 Mo. 240; *Hedecker v. Gauzhorn*, 50 Mo. 154. A parol promise by one owning lands to give the same to another, will be enforced in equity when the promisee has been induced by the promise to go into possession, and with the knowledge of the promisor has made comparatively large expenditures in permanent improvements on the land. *Freeman v. Freeman*, 43 N. Y. 34; *Galbraith v. Galbraith*, 5 Kas. 402; *Hardesty v. Richardson*, 44 Md. 617; *Shepherd v. Berin*, 9 Gill. 32; *Langston v. Bates*, 84 Ill. 524; *Bright v. Bright*, 41 Ill. 97; *Despain v. Carter*, 21 Mo. 331; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 106; *Hiatt v. Williams*, 72 Mo. 214; *Collins v. Rogers*, 63 Mo. 515. In this case the proofs were not "loose" nor "indeterminate," nor did the court act upon "conjecture." 2 Story Eq. Sec. 754; *Langston v. Bates*, 84 Ill. 524; *Despain v. Carter*, 21 Mo. 331. Such contracts are either executory or executed. Executed contracts are controlled by principles different from those which obtain in executory contracts. Though without consideration, if one party proceeds to perform his part thereof, the court will enforce performance by the other under circumstances such as appear in this case. *Pratt v. Morrow*, 45 Mo. 407; *Russell v. Berkstresser*, 77 Mo. 425; *Kelley v. Hurt*, 74 Mo. 567. In this case possession had ripened into a perfect title in respondent. *Rannells v. Rannells*, 52 Mo. 108. This case is not within the statute of frauds. *Farror v. Patton*, 20 Mo. 81; *Dickson v. Chrisman*, 28 Mo. 134; *Charpiot v. Sigerson*, 25 Mo. 63; *Neal v. Neales*, 9 Wall. 1. Possession alone, without payment, is sufficient part performance to maintain a

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decree for specific execution. *Young v. Montgomery*, 28 Mo. 604. A promise is a good consideration for a promise. 1 Parsons on Cont. (5th Ed.) 448, 451. In equity cases the appellate court "will with extreme reluctance disturb a decree rendered by a court below on a point on which there was conflicting evidence." *Sharp v. McPike*, 62 Mo. 300. It will not do so unless the decision is clearly erroneous. *Cornet v. Bertelsmann*, 61 Mo. 118; *Gimbel v. Pignero*, 62 Mo. 240; or unless the evidence clearly preponderates in favor of plaintiff. *Davis v. Fox*, 59 Mo. 125; *Chapman v. McIlwrath*, 77 Mo. 38.

NORTON, J.—This is a suit in ejectment to recover possession of forty acres of land in the petition described. The answer of defendant, among other things, sets up that plaintiff is his grandfather and controlled and received the benefits of defendant's labor till he was twenty-three years old. That plaintiff became the owner of the land in 1867 and in 1868 gave it to defendant, but did not execute a deed therefor; that in the year aforesaid plaintiff told defendant that he had bought the land for him and requested defendant to take possession of it, clear the timber from it, fence and put it in cultivation and improve it as his own property, and to use it as such, and that if defendant would do as above stated the land should be his after a certain time, or when defendant's diligence and thrift were demonstrated by such said improvement of the land; that pursuant to such request and agreement defendant in 1868 entered upon said land, began and has ever since deadened trees, cleared the land, broke it up, put it in cultivation, in good farmer-like manner, built a dwelling, stable and other buildings thereon, with stock pens, dug a well for water and set out fruit trees, in the doing of which defendant devoted his whole time, skill and labor; and that he expended said time and labor in improving the farm believing it to be his own, and relied in good faith, in so doing, upon the said promise of plaintiff. For a further defense

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the statute of limitations was pleaded. The answer concludes with a prayer that the court decree title to defendant for said land, or that if plaintiff be allowed to recover on the legal title that a judgment for \$2,000 be given defendant for improvements made, and that the judgment be declared a lien on the land. The replication puts in issue the matters set up in the answer.

On a trial had before the court, without the intervention of a jury, the court rendered a decree vesting title in the defendant, from which the plaintiff prosecutes an appeal to this court. The following facts we think are established by the evidence: That defendant was the grandson of plaintiff and that he rendered service for plaintiff till he was about twenty-three years old; that plaintiff bought the land in controversy in 1867 and in 1868 agreed with defendant that he would make him a deed to the land if he would go on it, improve it, and make a living on it; that he put defendant in possession of the land which at the time was unimproved; that defendant, on the faith of said promises, took possession of the land as owner, cleared a greater portion of it of the timber, put it in cultivation, built a dwelling, fenced the ground, dug a well and made other improvements; that defendant occupied said land under said agreement for about ten or eleven years before suit brought, two years of the time by a tenant to whom he had leased the land as his, with the knowledge and assent of plaintiff. The court found these facts and based its decree upon them, and it is objected by plaintiff and appellant that they are not sufficient in law to warrant the decree. It is insisted by counsel that the contract relied upon is within the statute of frauds, and is without consideration, and that, therefore, the decree is erroneous. The answer to this is that the evidence shows, and the court below so found, that defendant in pursuance of and on the faith of said contract and offer of plaintiff entered into possession of it as owner, improved the same as set forth in the petition, thus bringing the case within the

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principle of the case of *Despain v. Carter*, 21 Mo. 331, where it is said that "whenever a party has been let into possession, and has made valuable improvements, expended money in building or repairs, these acts have been long and I may say uniformly considered, as taking the case out of the statute. If this were not so the party would be made the victim of a fraud practiced on him." See also, *Gupton v. Gupton*, 47 Mo. 37; *Hiatt v. Williams*, 72 Mo. 214; *Sutton v. Hayden*, 62 Mo. 101; *Freeman v. Freeman*, 43 N.Y. 34; *Neal v. Neales*, 9 Wall. 1; *Hardesty v. Richardson*, 44 Mo. 617; 23 How. 347; 13 Vesey 147; *Bright v. Bright*, 41 Ill. 97; *Langston v. Bates*, 84 Ill. 524.

During the progress of the trial, a witness was allowed to testify, over plaintiff's objection, as to the number of plaintiff's children and the amount of his property. Conceding that the evidence so received was irrelevant, as the trial was by the court, the presumption can be indulged that the court gave no importance to it when it appears, as it does in this case, that without regard to such evidence the judgment is for the right party; and it further appearing that the granting of a new trial for this error could not affect the final result we would not be justified in reversing the judgment, as it is fully supported by the other evidence in the case. *Hedecker v. Ganzhorn*, 50 Mo. 154; *Jackson v. Magruder*, 51 Mo. 55; *Hodges v. Black*, 76 Mo. 537.

Judgment affirmed in which all concur, except Judges HOUGH and HENRY, absent.

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ALLEN V. SNYDER, *Appellant*.

Temporary Judge: JURISDICTION. A judge from another circuit who was temporarily present for the purpose of and was engaged in the trial of a particular case, in another cause which was pending before the regular judge, and in which the jury had retired to make their verdict, on their return into court and in the absence of the defendant and his counsel, verbally instructed them as to the form of their verdict, received the same, which was for plaintiff, and discharged them. *Held*, that he had no jurisdiction in the cause, and the judgment should be reversed.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

B. R. Vineyard and Ramey & Brown for appellant.

The first count of plaintiff's petition, is a declaration upon a special contract; there is no claim or pretense of a right of recovery upon a *quantum meruit*, and the trial court erred in its refusal of defendant's seventh instruction, which sought to confine the case to the contract alleged in the petition. *Eyerman v. Mt. S. C. Ass'n*, 61 Mo. 491; *Clements v. Yeates*, 69 Mo. 625. The plaintiff could not sue upon one cause of action and recover upon another. *Ens-worth v. Barton*, 60 Mo. 511; *Harris v. Railroad Co.*, 37 Mo. 307; *Stix v. Matheurs*, 75 Mo. 96. Judge Kelley erred in giving verbal instructions to the jury. Even had he been the judge who tried the cause this would still have been error. R. S. § 3655; *Hogel v. Lindell*, 10 Mo. 487; *Townsend v. Chapin*, 8 Blackf. 328; *Kenworthy v. Williams*, 5 Ind. 375; *Laselle v. Wells*, 17 Ind. 33; *Shafer v. Stinson*, 76 Ind. 375; *Stratton v. Paul*, 10 Iowa 139; *Wilson v. Town of Granby*, 47 Conn. 59; *City Bank v. Kent*, 57 Ga. 285; *Dixon v. State*, 13 Fld. 636. And it makes no difference if the verbal instructions were favorable to the appellant, it is still error. *Widner v. State*, 28 Ind. 394; *Riley v. Watson*,

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18 Ind. 294. And even though the verbal instructions were simply explanatory of those written, and not inconsistent therewith. *Tyner v. Adams*, 34 Ind. 401; *The Toledo, Etc., R. R. Co., v. Daniels*, 21 Ind. 256; *Laselle v. Wells*, 17 Ind. 33. And even though the verbal instructions contained correct principles of law. *Hardin v. Helton*, 50 Ind. 319. Any verbal addition to the written instructions is likewise error. *Bosworth v. Barker*, 65 Ind. 595; *City Bank v. Kent*, 57 Ga. 285. And any explanation or addition verbally to the written instructions after the jury have been sent out and returned to the court room, will be ground for reversal of the cause. *O. & M. Ry Co. v. Rowland*, 51 Ind. 285. Judge Kelley, being temporarily on the bench, ought not to have manifested such concern for the rights of the plaintiff in his dealing with the jury. His conduct was in the highest degree improper, and presents just ground for a reversal. *State v. Alexander*, 66 Mo. 163, 164; *Norton v. Dorsey*, 65 Mo. 376; *Redmon v. Gulnac*, 5 Cal. 148; *Campbell v. Beckett*, 8 Ohio St. 210; *Davis v. Fish*, 1 G. Greene (Iowa) 406. Judge Kelley not only refused to receive the first verdict in the form it was presented—not only received the second verdict, but actually rendered the judgment thereon. The rendition of a judgment is judicial action.

Vories & Hill for respondent.

HENRY, J.—This suit was instituted in the circuit court of Buchanan county by plaintiff, on a contract by which he undertook to repair and rebuild for defendant a dwelling house which had been injured by fire, having the privilege of using in the work such portions of the old house remaining, as could be safely and properly used, and was to receive \$1,575 for the new materials, and the work and labor. \$750 of the contract price was paid, and this suit is to recover the balance, and enforce a mechanic's lien. There are two other counts in the petition which it is un-

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necessary particularly to notice, both relating to other work done, under a different contract from that set out in the first count.

The answer alleges that plaintiff did not perform the work mentioned in the first count according to the contract, in this to-wit: He did not erect said building in the manner he agreed to do. He did not remove the remains of the burned building as he agreed to do. He did not erect the new building of the dimensions he agreed to do; nor did he erect the octagon windows as he agreed to do; nor did the plaintiff furnish materials for the erection of said building and the performance of said work of the best quality, but on the contrary thereof, the materials furnished by him were of a very inferior quality. That he did not furnish joists for the first floor of the building above the cellar, but used therefor old joists which had been in the burned building, and which being too short to reach to the walls of the building, were spiked to other pieces of timber so as to reach from wall to wall. The porches were not erected and built by plaintiff in the manner he agreed to build and erect them, and those built by him were built of inferior and unsuitable material, and of sizes, dimensions and shapes different from those he agreed to build, and which are inferior in appearance and of much less value than those agreed to be built. That plaintiff wrongfully and fraudulently built said house and porches and performed said work in a very unskillful and unworkman-like manner, and out of very inferior and unsuitable material, and to an extent which renders said building unsafe as a dwelling house, and which is unfit and unsuitable to for the purpose intended. That said plaintiff wrongfully and unskillfully placed partitions within said building on the floors thereof and off the foundation walls and without any sufficient support whereby said floors were overloaded and the safety of the building endangered and its usefulness greatly impaired.

Defendant further states that shortly after plaintiff

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commenced said work, and before defendant had any notice of the fraudulent acts of plaintiff above complained of, defendant paid plaintiff \$750 on account of said work performed and materials furnished, which he avers is more than said work and materials are worth.

Defendant further avers that by reason of the wrongful and fraudulent acts of plaintiff as aforesaid, and in the improper, unskillful and dangerous manner in which said building and porches were erected, and of the inferior materials used in such erections, defendant has sustained damages in the sum of \$500, for which he asks judgment, and for all proper relief.

After retiring to consider of their verdict, the jury returned a verdict in favor of plaintiff for a gross sum, instead of a separate finding on each count.

Hon. W. H. Sherman, judge of the circuit court of Buchanan county, presided at the trial of the cause, but, when the jury returned with their verdict, Hon. H. S. Kelly, judge of an adjoining circuit, was, for a reason provided by statute, temporarily presiding at the trial, or in proceedings in another cause, and verbally instructed the jury that if they found for plaintiff on all of the counts, they should say in their verdict the amount found on each count, or, if on less than all, they should state in their verdict on which, and the amount. The paper containing the verdict was then returned to the foreman by said judge with directions to repair to their room for further deliberation, and they soon returned with a verdict for plaintiff on each of said counts. All this occurred in the absence of defendant and his counsel. We are not prepared to say that, if Judge Sherman had verbally instructed the jury, after their return into court with an informal verdict, that they should find on each count separately, it would have been reversible error; but waiving that question, Judge Kelly had no jurisdiction to receive the verdict and discharge the jury. So far as this cause was concerned he was not sitting or authorized to sit as a judge, and had no

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control over the jury, and, on this point, the case stands precisely as if any other person, not a judge of any circuit, had taken the bench in the absence of Judge Sherman, and done what Judge Kelly did.

For this error the judgment must be reversed, and the cause remanded, and as there must be a retrial of the cause, it will save the labor of examining and passing upon several difficult questions which are presented by this record, if plaintiff will amend his petition by adding a *quantum meruit* count, for the work and labor, etc., sued for, in the first count of his petition. All concur.

THE STATE *ex rel.* FARWELL *et al.* v. LELAND *et al.*, Appellants.

1. **Practice in Supreme Court:** EVIDENCE, REVIEW OF ITS EXCLUSION. In order that a party may have the exclusion of evidence reviewed in the Supreme Court, the bill of exceptions must clearly show what he expected to prove, so that the appellate court may judge of its admissibility and materiality, or the questions must be such as to clearly indicate what the answer will be and what the party desires to prove.
2. — : — : —. An exclusion of an answer to a question will not work a reversal for the defendant where it appears that an answer responsive thereto would not establish the defense relied on.
3. **Execution:** SHERIFF: LEVY, TIME OF. As a general rule, a sheriff who has an execution in his hands has until the return day of the writ within which to execute it. There may, however, be special circumstances which will require an immediate levy in order to make the process available.
4. — : — . —. It is the duty of the sheriff to make the levy within a reasonable time, in view of all the facts and circumstances of the case.

Appeal from Saline Circuit Court.—HON. J. P. STROTHER,
Judge.

AFFIRMED.

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A. J. Herndon and S. C. Major for appellants.

Reasonable diligence is a mixed question of law and fact, and the jury, in order to pass upon the same properly, should have all the facts and circumstances of the case before them. It was, therefore, error to exclude the evidence sought to be elicited from the defendant and his deputy. The court erred in refusing to give defendants' instructions. R. S. 1879, § 2338; *Kirkland v. Ferguson*, 13 Mo. 166. The instructions given for plaintiff, and by the court of its own motion, were misleading.

Draffen & Williams and R. C. Clark for respondents.

The court properly refused to permit the defendant and one of his deputies to state in what business they were engaged during the time the execution was unexecuted in their hands. *Elmore v. Hill*, 46 Wis. 618; *Redway v. Chapman*, 48 Mo. 218; *Campbell v. Luttrell*, 13 Mo. 27. Defendants' third instruction was properly refused. *Douglass v. Baker*, 9 Mo. 41; *Herman on Executions*, §§ 407, 410; 2 *Hilliard on Torts*, p. 191. *State ex rel. Kirkland v. Ferguson*, 13 Mo. 166, does not sustain appellant. Where a debtor is absent and cannot be notified, the sheriff must levy on all the property not specifically exempt, and permit the debtor to make his selection afterwards. *Herman on Executions*, § 151; *People v. Palmer*, 46 Ill. 398; *State ex rel. v. Emmerson*, 74 Mo. 607. It is unnecessary for plaintiff to point out the property to the officer, or to give any special directions in regard thereto. *State ex rel. v. Ownby*, 48 Mo. 71. The instructions were more favorable to the defendants than they had a right to ask. The court should have declared as a matter of law, that the undisputed facts showed that the officer was guilty of negligence. *Hearn v. Parker*, 7 Jones 150; *Elmore v. Hill*, 46 Wis. 618.

EWING, C.—The plaintiffs in this suit sued J. W. Chil-

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ton, in November, 1877, in the circuit court of Howard county on a note and recovered judgment for \$240.79. Sued out execution December 15, 1877, and on that day placed it in the hands of the defendant, Leland, sheriff of Howard county. It was returned the first Monday in April, 1878. On the same day another execution in favor of other parties and against Chilton was put into Leland's hands. Before Leland levied, the defendant in the execution, Chilton, made an assignment and Leland returned the execution *nulla bona*. Thereupon the plaintiffs sued Leland on his official bond for failure to levy, the other defendants being securities on his bond. Upon the trial in the Saline circuit court, where the case had been taken by change of venue, the plaintiffs read in evidence the judgment and execution against Chilton, and Leland's memorandum thereon that it was received December 15, 1877, and his return thereon, dated December 22, 1877. There was some objection to this judgment and execution, but the objection seems to have been abandoned here as no notice is taken of it. Plaintiffs then offered evidence which tended to show that J. W. Chilton was an old citizen of Howard county, who had been merchandising at New Franklin in said county for twenty years or over; that between the 15th of December and the 21st thereof, 1877, Chilton had in his storehouse from \$3,500 to \$4,000 worth of goods, and carrying on his business as usual; that the defendant, Leland, was familiar with these facts and was frequently at New Franklin and at Chilton's store; that during the time mentioned Chilton had \$12,000 or \$15,000 worth of notes and accounts due him. That Leland did nothing towards making a levy under the execution until the 21st of December, 1877, when his deputy, Boyd McCrary, went from Fayette, the county seat, to New Franklin, a distance of eleven miles, went to the store and enquired for Chilton, was told that he had gone to Boonville, two or three miles off across the river, into another county; that, after dinner, McCrary went to Boonville in search of Chilton, whom he

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found intoxicated to such a degree as to render him incapable of transacting business; that McCrary remained all night in the neighborhood and at five o'clock next morning called on Chilton; told him his business for the first time and was then told by Chilton that he had made an assignment the day before, about noon. This was the plaintiffs' evidence.

The defendant offered evidence tending to show that the sheriff received no instructions when he got the execution, and had no intimation from any source that Chilton contemplated making an assignment until he was told so by Chilton on the 22d day of December, 1877. That the December term of the circuit court of Howard county adjourned finally on December 14, 1877. Defendants then asked witness, Boyd McCrary, the deputy sheriff, "where were you and in what business engaged from the time you received the execution up to the time you went to Franklin?" To this question plaintiff objected on the ground that it was immaterial, which objection the court sustained. Defendant then introduced the defendant, Leland, and asked him the following questions: "In what business were you engaged on Monday, Tuesday, Wednesday and Thursday, December 17, 18, 19, 20, 1877?" To which question plaintiffs objected on the ground that it was immaterial. "Had you in your hands during the time above mentioned any other executions against other parties?" Objected to by plaintiffs, which objection the court sustained. Defendants then offered to prove the time of the opening and adjournment of the Howard circuit court for the December, 1877, term thereof, also same of the Howard county court for its December, 1877, adjourned term, which evidence was objected to by plaintiffs as immaterial; said objection was sustained by the court.

I. The main reliance of the appellant for a reversal of the judgment is the alleged error of the court below in refusing to allow the witnesses, McCrary and Leland, to answer the questions asked as set forth above. The rule

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seems to be that where a party desires to offer evidence which is objected to, the bill of exceptions must clearly show what the party offering it expects to prove, so that the appellate court may be able to judge of its admissibility and materiality; or the question must be such as will clearly indicate what the answer will be, or what the party desires to prove. Otherwise, as is well said in *Jackson v. Hardin*, decided at this term by Philips, C., "The case might be reversed on the naked refusal to permit an answer to this question, and on retrial it might appear that the matter elicited was wholly immaterial and incompetent." The same doctrine is announced in *Aull Savings Bank v. Aull*, 80 Mo. 199. The question might be preliminary to other and further evidence, but how can this court judge what the answer is to be or lead to, unless the purpose is disclosed? The question asked might seem to be pertinent to the issue, but the answer be altogether impertinent. The first question asked the witness, McCrary, was: "Where were you and in what business engaged from the time you received the execution up to the time you went to Franklin?" How is this court to determine in what direction the answer would lead? But, if we presume that the witness would have answered that he had other executions in his hands or was engaged in other business of his office, unless that answer was sufficient to excuse him for failure to levy, then we must further presume that it would have been followed up with other pertinent and material evidence. This could not be done. Before this court can pass upon errors alleged they must be made manifest. The error must appear. The court cannot presume it. The same objection exists as to the questions asked Leland, himself. It is not shown what the evidence or answer would have been and in the absence of such showing this court has nothing to act upon. We can well conceive how the defendants might have shown an excuse for failure to levy if the facts existed, but the questions are not so before this court as will make them available.

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II. On the other hand, admit that the questions were in such form as to disclose the materiality of the evidence. *Jackson v. Hardin, supra.* The answers to the questions propounded would not, of themselves, have been sufficient to reverse the case; because the answers responsive to these questions could not have fully established an excuse or reason sufficient to protect the defendant in failing to levy. The answer might have led to other questions and answers and facts material to the issue, but which this court cannot presume would have followed.

III. We think the rule laid down by Judge Napton in *State ex. rel. v. Rollins*, 13 Mo. 179, as to the duty of sheriffs is the correct one. It was followed in the same volume in the *State ex. rel. v. Ferguson*, 13 Mo. 117. Judge Napton in that case said: "A sheriff has the whole period of the running of the writ within which to execute it, and if it is executed by the return day it is sufficient. This we understand to be the general and usual duty of the officer. There may be circumstances, however, under which he would not be justified in postponing for a day the levy of his writ. The condition of things may be such as to require immediate steps on the part of the officer to make the process available." *Whitney v. Butterfield*, 13 Cal. 335; *Trigg v. McDonald*, 2 Hump. 386; *Commonwealth for Ashby v. Gill*, 14 B. Mon. 20; *Barnes v. Thompson*, 2 Swan 313; *Freeman on Executions*, sec. 252. The court below gave five instructions for the plaintiff but we shall only refer particularly to two; the first and third as follows:

1. The jury are instructed that it is admitted by the pleadings in this cause that in December, 1877, the defendant, V. J. Leland, was sheriff of Howard county, and that he and his co-defendants executed the bond sued upon, and if the jury shall find from the evidence that on the 8th day of December, 1877, the relators, John V. Farwell, Charles B. Farwell, William D. Farwell, Simon Farwell and John Harmon, recovered a judgment in the circuit court of Howard county against Joseph W. Chilton for the sum

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of \$240.79, together with costs, and that on the 15th day of December, 1877, an execution was issued upon said judgment and placed in the hands of the defendant, Leland, or his deputy, and that at the time the said defendant Leland or his deputy received said execution, the said Joseph W. Chilton had sufficient goods, wares and merchandise upon which said execution could have been levied, and out of which said debt could have been made, and that the defendant Leland or his deputy knew of said fact, or by reasonable diligence could have learned the same, and that said Joseph W. Chilton continued owner of said property for six days after said execution came into defendant's hands, and that the defendant took no steps to levy the same, and that on the 21st of December, 1877, said Chilton made an assignment of his property, and the relator's debt, or any part thereof, was lost by reason of the failure of the said Leland to levy said execution within a reasonable time, in view of these facts and circumstances in evidence, then the jury will find for the plaintiff, and assess the damages at such sum as they may believe, from the evidence, relators lost of such judgment, and by reason of the failure to levy said execution, with interest thereon at the rate of six per cent from the time of the return of the writ as shown by the evidence.

3. The jury are instructed that it was not necessary for the plaintiff in the execution described in the petition to have given any special direction to the defendant Leland or his deputy in regard to the levy of said writ, or to have pointed out the property of said Chilton, but if the said defendant Leland or his deputy knew of any property of said Chilton upon which said writ could have been levied, or if by reasonable diligence they could have found such property, then it was the duty of said sheriff or his deputy to have levied upon and seized such property (within a reasonable time, in view of all the facts and circumstances in evidence,) without any special directions to do so.

These instructions fairly submitted the issue to the

jury and are in line with the rule quoted from 13 Mo *supra*. The question was, did the sheriff levy "within a reasonable time in view of all the facts and circumstances in evidence?" When the plaintiff proved the facts as alleged in the first instruction they had made a *prima facie* case; and it was then for the defendant in his defense to offer in evidence "facts and circumstances" which would excuse him for not levying.

IV. The defendants asked twelve instructions which were refused by the court and who then, of its own motion, gave four which were the substance of four asked by the defendant and presented to the jury the proper issues for their consideration. They are as follows:

"1 The court instructs the jury *that in the absence of any evidence* the law presumes the sheriff to have done his duty, and unless [the plaintiff satisfies them] *they believe* from the evidence that defendant failed to use reasonable diligence in the execution of the writ, their verdict must be for defendant

"2. If the jury believe from the evidence, that on the 15th day of December, 1877, an execution was issued against one J. Warren Chilton, in favor of plaintiff, and placed in the hands of this defendant, and that the return day of the execution was on the first Monday of April, 1878, and that prior to the return day thereof and during the existence of the execution, said J. Warren Chilton made an assignment of all his property for the benefit of his creditors, they must find for the defendants, unless [the sheriff was guilty of a breach of duty by failure] *they believe from the evidence that the sheriff failed to use reasonable diligence in making a levy before the assignment.*

"9. If the jury believe from the evidence that the defendant, Leland, as sheriff, used reasonable diligence, *in view of all the facts and circumstances in evidence*, in executing the writ of execution in favor of the relators, they will find for the defendants. *Reasonable diligence on the part of a sheriff charged with a writ of execution, requires*

that he be diligent in executing the writ, according to its command, as shown by the writ in evidence; that he be vigilant and prompt in acting upon information which he possesses, or might by reasonable diligence obtain, in reference to the condition of the property of the defendant in such execution, and that he take such steps as are necessary to secure the payment of such execution out of the property of the defendant therein, if possible, before or by the return day of such writ and within a reasonable time after it goes into his hands, in view of his duty as above stated.

"7. The jury are instructed that the fact that defendant received said execution on the 15th of December, 1877, and that he did not attempt to levy the same on the goods of said Chilton until the 22nd day of December, 1877, (is) *would not of itself, alone and without any other evidence, be sufficient to impute negligence to defendant, notwithstanding the said defendant knew the said Chilton had sufficient property upon which to levy and satisfy said execution, the return day of said execution being on the first Monday in April, 1878.*

The words in brackets were stricken out of the above instructions, as asked by the defendants, and the words in italics added by the court.

The third instruction asked by the defendants is as follows:

3. The court instructs the jury that the sheriff, in the absence of any special instructions by plaintiff, or their attorney, or circumstances which the use of ordinary diligence should have brought home to him the failing condition of said Chilton, had until the return day of the writ within which to execute the same; and if they believe said sheriff exercised a reasonable diligence in executing said writ up to the day when the defendant in the execution protected his property from levy by his assignment, their verdict should be for the defendant.

This in substance and, as we conceive, more clearly expressed, was given in the first and third for the plaintiffs,

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and we see no error in refusing it. If the question is fairly submitted to the jury, it is immaterial who prays the instruction. The question of diligence under all the evidence and circumstances in the case was, we think, fairly submitted to the jury. They are the triers of the facts. They have found the facts for the plaintiffs and with which this court cannot interfere.

The judgment below is affirmed. All concur. NORTON and SHERWOOD, JJ., absent.

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KERR, *Appellant*, v. SIMMONS *et al.*

1. **Appeal from the St. Louis Court of Appeals:** AMOUNT IN DISPUTE: JURISDICTION. In a case appealed from the circuit court of St. Louis county to the St. Louis court of appeals, it appeared that the plaintiff sued for an amount in excess of \$2,500, but the answer of the defendant pleaded a judgment and satisfaction as to a part of the amount sued for, which, if true, was sufficient to reduce plaintiff's claim to less than \$2,500, to which plea plaintiff demurred, and his demurrer being overruled, stood on it, and judgment was entered thereon against him; *Held*, that the demurrer admitted the recovery of the amount as alleged in the answer, that the matter in dispute on the appeal was, therefore, less than \$2,500, and that no appeal would lie to the Supreme Court.
2. **Pleading:** DEFENSE PRO TANTO: DEMURRER. Where defendant in his answer to an action for rent, alleges that plaintiff has already maintained one action against him predicated of the lease sued on, which recovery embraced part of the time for which recovery is sought, such fact so pleaded constitutes a good defense. Whether it is a bar to the whole action, or *pro tanto*, is a matter of law for the court, and being unquestionably good as a defense to a part of the cause of action, a demurrer thereto is properly overruled.

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APPEAL DISMISSED.

Thos. T. Gantt, for appellant.

The Supreme Court has jurisdiction of this appeal. The recovery of the rent for January was set up as a bar to the whole action, and the answer was insufficient for that reason. The claim of the plaintiff being for upwards of \$4,000, and the defense interposed not being good in law, how can the jurisdiction of this court be questioned? Clearly, it will be necessary to go outside of the record to do this. The appeal brings up nothing except the sufficiency of the defense made by this "further answer" to the whole action. Whatever the court may conjecture, is really beside the question. And the practice will be novel, indeed, if conjectures are resorted to, in order to defeat the jurisdiction of this court. A demurrer admits only such facts as are well pleaded. A plea or answer which is interposed as a defense to the whole, but which only answers part of it and leaves the residue undefended, is demurrable for that reason. *Sterling v. Sherwood*, 20 Johns. Rep.; Gould on Pleading, pp. 362, 363; 1 Chitty Pleading (7 Am. Ed.) p. 554. The matter set up in the "further answer" of the defendants is not a bar to the whole action stated in the amended petition. Taylor on Landlord and Tenant (7th Ed.) § 525; *Digby v. Atkinson*, 4 Camp. 275; *Schuyler v. Smith*, 51 N. Y. 309; *Conway v. Starkweather*, 1 Den. 113; *Bradley v. Covel*, 4 Cow. 349; *Abeel v. Radcliff*, 15 John. 507; *Hunt v. Bailey*, 39 Mo. 257; *Despard v. Walbridge*, 15 N. Y. 374; *Quinette v. Carpenter*, 35 Mo. 502; *Finney v. St. Louis*, 39 Mo. 177.

Chester H. Krum and *Walter B. Douglas* for respondents.

This court has no jurisdiction of this appeal; the amount in dispute exclusive of costs, does not exceed the sum of \$2,500. Const., art. 6, § 12; *Lee v. Warren*, 1 Wall. 337; *Schacker v. Hartford Ins. Co.*, 93 U. S. 241; *Gray v.*

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Blanchard, 97 U. S. 564; *Banking Asso'n v. Ins. Asso'n*, 102 U. S. 121; *Tinstman v. Nat. B'k*, 100 U. S. 6; *Pierce v. Wade*, 100 U. S. 444. The contract sued on is an entirety, and one recovery having been had upon it, the whole demand was thereby merged in that recovery. The answer alleges that a recovery was had for the month of January. This averment the demurrer admits. The case falls, therefore, within the familiar rule, that a single or entire demand cannot be split up so as to constitute the basis of more than one suit. "*Nemo debet bis vexari pro una et eadem causa.*" *Freeman on Judg.*, § 238; *Wagner v. Jacoby*, 26 Mo. 532; *Miller v. Covert*, 1 Wend. 487; *Fireman's Ins. Co. v. Cochran*, 27 Ala. 238; *Secor v. Sturgis*, 16 N. Y. 554; *Stein v. Prairie Rose*, 17 Ohio St. 472; *Bancroft v. Winspear*, 44 Barb. 209; *Logan v. Caffrey*, 30 Pa. St. 196; *Simes v. Zane*, 24 Pa. St. 242; *Booge v. Railroad Co.*, 33 Mo. 212; *Davis v. Maxwell*, 12 Met. 286; *Trask v. Railroad Co.*, 2 Allen 331; *Pinney v. Barnes*, 17 Conn. 420. There is no merit in the point, that the answer to the amended petition was a plea which answered only a part of the cause of action. The answer responded to the whole of the amended petition. It alleged a recovery for the month of January. There could be no better answer as to that part of the amended petition. It alleged a continuous withholding down to February 28, 1879. It pleaded the recovery for the days in January in bar to a recovery of the balance claimed for the days of February. The demurrer is so technical, that its grounds are as unstable as they are attenuated.

PHILIPS, C.—The plaintiff, Kerr, sued the defendants on a contract of lease. The pleadings and history of the action, based on the original petition, will appear by reference to the report of the case found in 9 Mo. App. Rep. 376.

On the reversal and remanding of the cause to the circuit court of St. Louis county, the plaintiff filed an amended petition, alleging, substantially, that on the 10th

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day of March, 1873, one Biddle leased certain property in the city of St. Louis to the defendants for a term to end on the 31st day of December, 1878, at the yearly rental of \$12,500, payable in monthly installments. It averred that defendants in said contract of lease covenanted with said Biddle and his assigns, that they should pay to him or his assigns the rent reserved during the term, and that they would pay double the rent for every day they, or any one else in their name, should hold on to the said premises after the expiration of the said term, to-wit: after December 31st, 1878. That before the expiration of the term said Biddle granted to plaintiff, Kerr, the reversion of the demised premises, and assigned to him all the interest of Biddle in the said lease; and that defendants attorned to plaintiff. It is then averred that defendants withheld from plaintiff the possession of the premises after December 31st, 1878, and held on to the same until the 28th day of February, 1879. Wherefore, by reason of their said covenant, it is alleged the defendants became liable to pay plaintiff double the rent as aforesaid, for the months of January and February, amounting in the aggregate to the sum of \$4,166.66 for which judgment is asked.

The defendants answered, denying generally the allegations of the petition, except as thereafter admitted. The answer then, after admitting the execution of the lease, claimed that the petition did not fully and correctly set out its terms. It then averred that by the terms of the lease defendants covenanted to surrender the premises at the end of the term, and to pay double the rent reserved thereon for every day they should thereafter hold the same; that they did not surrender at its termination on the 31st day of December, 1878, but held on until the 28th day of February, 1879. It is then alleged that in 1879 the plaintiff brought suit against them on the same covenant sued on herein, and recovered judgment against them thereon, covering the month of January embraced in this action, in the sum of \$2,126.63, which defendants have fully paid and satisfied.

To the matter pleaded in the last paragraph of the answer plaintiff demurred, chiefly on the ground that it professed to plead in bar to the whole action matter which constituted no defense to the entire action. The demurrer was overruled, and the plaintiff failing to reply, judgment was entered against him as for want of a reply. From this action of the court he appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed. He has brought the cause here on appeal.

I. The question lying at the threshold of this appeal is, has this court jurisdiction of the case? Section 12 of Article 6, of the State constitution, provides that: "Appeals shall lie from the decisions of the St. Louis court of appeals to the supreme court * * in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of \$2,500," etc. The amount sued for, on the face of the petition is \$4,166.66; which sum represents the whole amount of rent for the months of January and February. The answer averred that plaintiff had recovered from defendants the sum of \$2,126.63, being the amount of rent for said month of January, which would leave a balance only of \$2,040.03, being less than \$2,500. If, therefore, the state of the pleadings be such as to admit this fact, this court has no jurisdiction over the subject matter on appeal from the St. Louis court of appeals. The jurisdictional fact, in such cases is not necessarily to be determined by the sum demanded in the petition. The language of the constitution is, "the amount in dispute." To ascertain the actual amount in dispute recourse should be had to the whole record. The federal statute providing for appeals from the circuit courts to the Supreme Court of the United States, contains the same language, in effect, "the matter in dispute." In *Lee v. Watson*, 1 Wall. 337, the court says: "By matter in dispute is meant the subject of litigation, the matter for which suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined." So in *Schacker v. Hartford*

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Fire Ins. Co., 93 U. S. 241, the court held that, although the amount for which judgment was asked was \$3,000, yet, if on inspection of the record it appearing that recovery could not, in fact, be had for more than \$1,400, the court had not jurisdiction. And in *Gray v. Blanchard*, 97 U. S. 565, the court say: "While in the absence of anything to the contrary the prayer for judgment by the plaintiff, in his declaration or complaint, upon a demand for money only, or by the defendant in his counter-claim or set-off, will be taken as indicating the amount in dispute, yet if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining our jurisdiction. Ordinarily this will be found in the pleadings, but we need not necessarily confine ourselves to them. We hear the case upon the record which is sent up, and, if taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed."

It is apparent from the face of the petition, that, if the month of January were eliminated, the amount in dispute would be less than \$2,500. The answer alleged facts which, if true, showed that the plaintiff had judgment and satisfaction for the identical sum claimed for the month of January. Did not the demurrer admit this fact? The learned counsel, quite ingeniously seeks to avoid the effect of the admission of the demurrer by arguing that the matter demurred to was pleaded in bar of the whole action, and as the plea was good only, as a defense to a part of the action or sum sued for, it was bad as a whole; and as a demurrer admits only facts that are well pleaded, there was, in legal contemplation, no admission of the fact of adjudication and payment of the sum, in part, sued for. He, therefore, very adroitly seeks to force upon this court the determination of the correctness of the decision of the court of appeals on the question as to the judgment and satisfaction pleaded being a bar to the action for the rent of February. Attention to the whole answer forbids, as we think, the construc-

tion placed by plaintiff's counsel upon the matter demurred to. He argues the case on the assumption that the prayer for judgment by defendants is in connection with and based on the effect of the fact pleaded touching the former recovery. This is incorrect in fact, as the "wherefore defendants pray judgment, etc.," is at the conclusion of the whole answer and in a separate paragraph.

Under our system of pleading the facts constituting the cause of action, or matter in defense, are required to be stated. The relief to which the party is entitled, the effect of the matters set up, is determined by the court as a matter of law, from the facts pleaded. Neither evidence nor conclusions of law are to be stated. The prayer itself is not demurrable. *Saline County v. Sappington*, 64 Mo. 72. Though the prayer asked for too much, the court will administer judgment in accordance with the facts alleged and proved. *McClurg v. Phillips*, 49 Mo. 315. The practice act was to make all pleadings special, to abolish general averments stating conclusions of law, in a declaration or answer. It was meant that the pleadings should be a statement of the facts of the case on both sides, not of the evidence, but of the facts to which the law is applicable." *Gamage v. Bushell*, 1 Mo. App. 418. "The allegation controverted must be the statement of a fact; hence, in making an issue he has nothing to do with legal conclusions." Bliss Pl. 334. The code itself provides that "the court may grant him any relief consistent with the case made and embraced within the issue." The portion of the answer demurred to stated as a fact that the plaintiff had maintained one action against him predicated of the contract sued on, which recovery embraced a part of the same period of time for which recovery is here sought. The fact pleaded certainly constituted a good defense. Whether it was a bar to the whole action or *pro tanto* was a matter of law for the court. Whether it was one or the other the fact remained, and so was well pleaded. It certainly would have been error in the trial court to have stricken it out as

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constituting no defense. The demurrer admitted the truth of the fact pleaded for the purposes of the demurrer. Being unquestionably good as a defense to a part of the cause of action declared on, the demurrer was properly overruled. The demurrer admitted the fact, but raised the issue of its legal effect. On this admission it is manifest the amount actually in dispute on this record does not exceed the sum of \$2,500, and this court is without jurisdiction acquired through the appeal.

The provision of the constitution was ordained for a wise purpose, in the judgment of the convention. It was to relieve the overcrowded condition of the docket of the Supreme Court, and to afford relief and protection to litigants within the local jurisdiction. Both its spirit and letter should be observed by the Supreme Court, by not suffering them to be evaded by sacrificing substance to shadow.

It follows that the appeal should be dismissed. All concur. HOUGH, C. J., absent.

FINK V. THE MISSOURI FURNACE COMPANY, *Appellant*.

1. **Negligence: INDEPENDENT CONTRACTOR.** One who contracts with a furnace company to take sand from its land, and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is, therefore, not liable for his negligence in conducting the work.
2. **Independent Contractor, Definition of.** An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

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REVERSED.

Henry Hitchcock, for appellant.

The question whether the relation which exists in a given case is that of master and servant, or of an independent contractor, does not depend upon whether the employer retains the power of terminating the work, or of directing it to be carried on at this or that place (if the place where it is carried on be indifferent) but depends upon the question whether such employer retains control, by the terms of the contract, over the mode and manner of doing the work. If it appear that the contract merely requires that the person employed thereunder shall bring about a given result by his labor, the manner of applying that labor being left to his own discretion, and his compensation being regulated by the results accomplished, then it is an independent contract of employment, and not a contract of service. *Morgan v. Bowman*, 22 Mo. 538; *Clark v. Railroad Co.*, 36 Mo. 218; *Hilsdorf v. St. Louis* 45 Mo. 98, 99; 2 Thompson on Negligence, p. 899, § 22; *Harrison v. Collins*, 86 Pa. St. 153; *Linton v. Smith*, 8 Gray 147; *Hilliard v. Richardson*, 3 Gray 349; *DeForrest v. Wright*, 2 Mich. 368; *Steele v. Railway Co.*, 32 Eng. Law and Eq. 366; *Storrs v. Utica*, 17 N. Y. 107; *Pack v. Mayor*, 4 Seld. 222; *Milligan v. Wedge*, 12 A. & E. 337. It was proved that the excavation was made upon the private property of the defendant, for a lawful purpose, and that it was at such a distance from the public highway that no person passing over the highway would be endangered thereby. Under these circumstances, it has been repeatedly decided and finally settled by this court that the owner of an unenclosed lot, whether in an open prairie or within the limits of an incorporated city, is not liable for damages to animals or persons trespassing thereon by reason of an unguarded pit or excavation upon said lot into which they fell. *Hughes v. Railroad Co.*, 66 Mo. 326; citing *Knight v. Abert*, 6 Pa. State, 473; affirmed in *Turner v. Thomas*, 71

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Mo. 597. The cases in which an apparent exception to this doctrine is asserted in respect of injuries resulting to children trespassing upon private grounds, rest invariably upon the further proof or assumption that the defendant did know, or had good reason to believe, under the circumstances of the case, that children would resort to said premises, and also, that the absence of safeguards or preventive means they would be injured thereby. *Stout v. Sioux City, etc., Ry Co.*, 2 Dillon, 298; affirmed in *Railway Co. v. Stout*, 17 Wall. 657, 662; *Keffe v. Railroad Co.*, 21 Minn. 207; *Hydraulic Co. v. Orr*, 83 Pa. St. 332; *Boland v. Railway Co.*, 36 Mo. 490; and see 2 Thompson on Negl., p. 1196, note 6. The court of appeals (10 Mo. App. 69, 70) erred in holding that the defendant was under a duty either to prosecute the work of excavating in a different manner than by undermining, or else to maintain a fence or other safeguard against trespassing children, and that Stevenson's conduct in partially undermining said bank, and leaving it in that condition when he went away to deliver a wagon-load of sand, was culpable negligence imputable to the defendant company. *Straub v. Soderer*, 53 Mo. 42; *Hughes v. Railroad Co.*, 66 Mo. 326; *Turner v. Thomas*, 71 Mo. 596; *White v. Phillips*, 15 Com. B. (N. S.) 245; *Sweeney v. Old Colony, etc. Railway Co.*, 10 Allen 372; 1 Thompson Negl., p. 303. The cases concerning children chiefly relied on by the court of appeals, were cases where the child itself was the plaintiff and not actions by the surviving parent for statutory damages. *Railroad v. Stout*, 17 Wall 657; *Stout v. Railroad Co.*, 2 Dill. 294; *Keffe v. Railway Co.*, 21 Minn. 207; *Hagan's Petition*, 5 Dill. 96. The court of appeals erred in its ruling on the question of contributory negligence, in holding that the evidence did not warrant the conclusion of the circuit court, that the plaintiff herself was guilty of contributory negligence, and the court of appeals, likewise erred in holding that the question of contributory negligence should have been submitted to the jury. *Stillson v. Railroad Co.*,

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67 Mo. 674; *Waite v. Railroad Co.*, 96 Eng. C. L. 728; *Koons v. Railway Co.*, 65 Mo. 592; *Boland v. Railway Co.*, 36 Mo. 490; *Maher v. Railroad Co.*, 64 Mo. 275; *Owens v. Railroad Co.*, 58 Mo. 393. The question of contributory negligence is a question for the jury only where either (1) the facts are disputed, or (2) where there is a dispute or reasonable doubt as to the inferences to be drawn from undisputed facts. *Nagel v. Railway Co.*, 75 Mo. 665 and cases cited; *Wyatt v. Citizens' R. R. Co.*, 55 Mo. 489, and cases cited. In this case there was no dispute about the facts. If the plaintiff's contention, which indeed is the very foundation of her case, that the sand bank was at once attractive and dangerous, be true, it is also true that her own negligence in permitting the child to go there under her very eyes, was the cause of its death.

Klein & Fisse and *O. G. Hess* for respondent.

(a) Where a land-owner knows, or has reason to know, that his premises are attractive to children, so that they are likely to resort thereto, and that in consequence of his own acts thereon, children who enter upon the premises are exposed to danger, he is bound to use reasonable care to protect them against that danger; and if, as a result of his failure to exercise such care, a child, although trespassing at the time, suffers injury, the child, or its representatives, may maintain an action against him to recover damages for such injury. *Boland v. Railway Co.*, 36 Mo. 484, 490; *Frick v. Railway Co.*, 75 Mo. 542; *Nagel v. Railway Co.*, 75 Mo. 653; *Stout v. Railroad Co.*, 2 Dill. 294; *s. c.*, *sub. nom.*, *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Railroad Co.*, 21 Minn. 207; *Kansas City R. R. Co. v. Fitzsimmons*, 22 Kas. 686; *Whirley v. Whitman*, 1 Head (Tenn.) 610; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Birge v. Gardiner*, 19 Conn. 507; *Lynch v. Nurdin*, 1 Q. B. 29; *Clark v. Chambers*, 3 Q. B. Div. 327, 339. (b) Whether in any given case the owner has exercised due care, is a question

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for the jury. *Railroad Co. v. Stout*, 17 Wall. 657; *Lane v. Atlantic Works*, 100 Mass. 104; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 232; *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319; *Kansas City R. R. Co. v. Fitzsimmons*, 22 Kas. 686; *Boland v. Railway Co.*, 36 Mo. 484, 491; *Callahan v. Warne*, 40 Mo. 131, 136; *Norton v. Ittner*, 56 Mo. 351; *Mauermann v. Siemens*, 71 Mo. 101; *Nagel v. Railway Co.*, 75 Mo. 653. It is for the jury to determine to what extent the plaintiff's negligence, if any existed, contributed to the injury; and the court is not justified in withdrawing the question from their consideration, except in cases where the evidence clearly shows that the injury is attributable solely to the plaintiff's want of care. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 300; *O'Flaherty v. Railroad Co.*, 45 Mo. 70; *Smith v. Railroad Co.*, 61 Mo. 588; *Dale v. Railway Co.*, 63 Mo. 455; *Frick v. Railway Co.*, 75 Mo. 542. The relation existing between Stevenson and the defendant was that of master and servant. *Morgan v. Bowman*, 22 Mo. 538; *Darmstaedter v. Moynahan*, 27 Mich. 188; *Whitney v. Clifford*, 46 Wis. 138. Consequently the defendant is responsible for his acts upon the premises, if they are of such a character as would justify a jury in finding that they were negligent. But even if Stevenson was not a servant, the defendant is liable. It cannot avoid its legal duty by permitting irresponsible persons, over whose actions it does not reserve any control, to endanger the lives of children, innocent of wrong, by the creation on its property of such traps and fatal agencies as was shown in this case.

NORTON, J.—This suit was instituted in the circuit court of the city of St. Louis, to recover \$5,000 statutory damages for the death of plaintiff's son, about four years old, alleged to have been occasioned by the negligence of defendant. Upon a trial had in said court, at the close of the evidence the court, at defendant's instance, instructed the jury that, under the evidence, plaintiff could not recover; whereupon plaintiff took a nonsuit with leave to

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move to set the same aside, and her motion made in that behalf being overruled, the cause was taken by writ of error to the St. Louis court of appeals, where the judgment of the circuit court was reversed and the cause remanded, and from this judgment defendant prosecutes his appeal to this court.

It appears from the record, that defendant was the owner of the lot on which the accident, resulting in the death of plaintiff's child occurred; that the lot was located in Carondelet in the city of St. Louis, and was bounded on the north by St. Dennis street, on the east by an alley, on the south by a lot belonging to one Williams, on which he had a house fronting on Seventh street, which street was on the west of defendant's lot; that said lot was about 120 feet deep eastwardly from Seventh street and fronted on said street between 75 and 100 feet; that the natural grade of the lot was such that next to the Williams lot, the ground was higher by seven or eight feet than it was at St. Dennis street, and that neither one of said streets was macadamized or curbed; that there were quite a number of houses in the vicinity of said lot which were occupied by families with a number of children; that for several years previous to the accident, a colored man by the name of Stevenson had been hauling sand from said lot for the use of defendant in their furnace, some distance from the lot; that the soil of said lot consisted of a layer of loam on top two or three feet in depth, underneath which was the sand that said Stevenson had been engaged in digging and hauling; that the method pursued by said Stevenson in procuring the sand, was such as to cause the superincumbent soil to fall of its own weight; that this excavating or undermining had been made in a horse-shoe shape, so that the grade of the lot gradually descended from St. Dennis street until at the point where the bank was still standing the grade was about three feet below that of St. Dennis street; that the face of the bank in which the digging was being done, was within six or eight feet of said Williams' fence at the

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southern end of the lot, and was from six to ten feet in height above the lowest point of the lot; that for two years previous to the accident the lot had not been fenced; that two or three fences had before that time been put around it but had been torn down and carried away by persons unknown; that plaintiff was a widow with four children who earned her living by washing, scrubbing and such other work as she could get, and that on the 27th of August, 1879, the day of the accident, she went to the house of said Williams whose lot adjoined the one in question on the south, as above set forth, for the purpose of washing, and took with her for the purpose of caring and looking after him her youngest son, Charles, about four years old; that on that day said Stevenson with a colored man named Jones, whom he had hired upon his own account and with whom defendant had no contract relations so far as the record shows, were digging and hauling sand from said lot, and excavating the sand by digging into the bank at the bottom to a depth of two or three feet making a hole in the face of the bank of three feet in height and four or five feet in width and causing the superincumbent soil to fall down by its weight, convenient to haul away in their wagon; that at about 11 o'clock on that day Stevenson and Jones left the lot with a load of sand and during their absence, between 12 and 1 o'clock, the bank which they had undermined fell covering up plaintiff's child so that he was dead when found.

It appears from the evidence of plaintiff that a few minutes before the accident the child, who had been with its mother and under her care inside the inclosure of the Williams fence, went out of the inclosure; that the mother saw it go out and seat itself near the outside of the fence on the bank which subsequently caved in; that she neither called nor required it to return inside the inclosure on the Williams lot.

The question lying at the threshold of the case is, Was the relation which Stevenson sustained to the defend-

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ant, in the work he was engaged to do, that of a servant or independent contractor? If the relation was that of contractor, the present action is not maintainable; if, on the other hand, it was that of a servant, then it is maintainable, provided the other facts in the case show that the injury was occasioned by the negligent acts of the servant, without contributory negligence on the part of plaintiff. The legal test for the determination of the question is stated by Thompson on Negligence, vol. 2, 899, sec. 22, as follows: "The general rule is that one who has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractor or his servants, committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. The contractor must answer for his own wrongs committed in the course of the work by his servants." The principle stated in the text by this writer has been recognized and affirmed by this court in the following cases: *Hilsdorf v. City of St. Louis*, 45 Mo. 98, 99; *Morgan v. Bowman*, 22 Mo. 538; *Clark v. H. & St. Jo. Railroad Co.*, 36 Mo. 218; *Barry v. City of St. Louis*, 17 Mo. 121.

According to the record before us, but one witness testified in regard to the contract between defendant and the parties engaged in digging and hauling sand. This witness was Mr. Asper, the foreman of defendant, who was introduced by plaintiff and testified that he heard the contract between Stevenson and Cushman, vice-president and manager of defendant, and upon being asked to state what the arrangement was between the men hauling sand and defendant, answered as follows: "Stevenson had a

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contract with the defendant to deliver sand to the furnace at fifty-five cents a load. Jones had nothing to do with the company. There was no stipulation made with Stevenson as to how he should dig the sand that I know of." It also appeared that defendant gave Stevenson permission to get the sand from the lot where the accident occurred which belonged to defendant. Besides the above there was no other evidence concerning the contract. The contract as proved, speaking for itself, only shows that defendant agreed with Stevenson, engaged in an independent employment, to haul sand for it, and to pay him for such service a stipulated price per load. No control over Stevenson in reference to the mode and manner he was to execute the work he agreed to perform was reserved in the contract, and the only witness to the contract who testified, said there was no stipulation with Stevenson as to how he should dig the sand. Applying the rule adverted to to the contract as proved, we think it follows that Stevenson was an independent contractor, representing the will of his employer only as to the result of his work, and not as to the means by which he was to accomplish it.

The case of *DeForrest v. Wright*, 2 Mich. 368, illustrates the principle underlying cases of this class, in which it was held that when a drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer at so much per barrel, and while engaged in the work, through the carelessness of the drayman, one of the barrels rolled against and injured a person passing on the sidewalk, the employer was not liable for such injury. This case is more analogous to the one before us than the case of *Whitney v. Clifford*, 46 Wis. 138, to which we have been cited, where the liability of Clifford was made to attach to him, as the owner of the saw mill, by reason of the fact that it was the duty as well as the contract obligation of Clifford, who had hired one Dodge to manufacture shingles for him, to keep in repair the

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smoke stack from which sparks had escaped and occasioned the injury sued for.

During the progress of the trial witness, Asper, stated that defendant purchased another lot and Stevenson quit hauling from the other place, and he was then asked by whose orders he quit. This question was objected to as being irrelevant, the court sustained the objection, and this action of the court is assigned for error. The relevancy of the question is to be determined by the fact, whether, if an answer had been returned to it, that it was by direction of defendant Stevenson quit hauling from one place and hauled from another had any tendency to show that defendant had control over Stevenson as to the mode and manner he was to execute the work he had contracted to perform. We are of the opinion that it did not bear any such tendency and that the objection was properly sustained. While such an answer would have tended to show that defendant controlled Stevenson as to the place from which to procure the sand, it had no tendency to establish the fact that defendant exercised control over the method to be pursued in the execution of the work.

This witness was, also, asked if at the time, or previous to the accident, the furnace company could have directed to have hauling from this lot stopped. An objection to this question was properly sustained, inasmuch as it called for no fact, but simply for an expression of the opinion of the witness, as to what defendant could or could not do under the contract existing between the parties.

The view we have taken of the cause renders it unnecessary to consider any of the other questions presented in the argument and briefs of counsel, and leads to a reversal of the judgment of the St. Louis court of appeals and an affirmance of the judgment of the circuit court, and it is so ordered. All concur.

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LOWE V. EKEY, *Appellant*.

1. **Tax Deed: DESCRIPTION OF LAND.** The description of the land in a tax deed must conform to that contained in the anterior proceedings.
2. ———: **ABBREVIATIONS: STATUTE.** Under Wagner's Statutes, page 1212, section 240, authorizing certain abbreviations in describing land in tax deeds and proceedings relating to the same, abbreviations can be used only as provided in said section, and when used they will be insufficient under said section, unless the land intended to be designated by their use is so designated thereby that it may be identified or located.
3. ———: ———. Abbreviations used in description of land in the tax deed and anterior proceedings in this case, held insufficient.

Appeal from Franklin Circuit Court. — HON. A. J. SEAY,
Judge.

REVERSED.

Crews & Booth for appellant.

The tax deed is void, and utterly insufficient to convey that part of the northwest quarter of northeast quarter, section fifteen, township forty-two, range one east, which lies north of the Union road, and west of the Atlantic & Pacific R. R., for the following reasons: 1. Because it does not purport to convey 13 15-100 acres in northwest quarter of northeast quarter of said section fifteen, lying north of said Union road, and west of said railroad, when the land sued for is but about half of the land in said northwest quarter of northeast quarter lying north of said Union road, and the deed does not indicate in what part of the tract north of the Union road the 13 15-100 acres are located. *City of Jefferson v. Whipple*, 71 Mo. 519; *Nelson v. Goebel*, 17 Mo. 161; *Alexander v. Hickox*, 34 Mo. 496. There was no evidence tending to show that the land was known by the description contained in said tax deed. The proceedings in tax sales are not viewed as on the same footing with proceedings on execution in ordinary suits.

Blackwell on Tax Titles, p. 301, side page 304. See, also, Blackwell on Tax Titles, (3 Ed.) top pp. 379 to 381, side pp. 381 to 383 and top pp. 123 to 129, side pp. 124 to 130. 2. Because the description in the tax deed did not follow the description in the preceding tax proceedings. Appellant maintains that the tax deed not describing the land as west of the Atlantic & Pacific Railroad, it is a good conveyance of all the land north of the Union road, whether on the one side or the other of the railroad. But this position is clearly wrong. The tax deed must follow the assessment, judgment and execution. See Blackwell on Tax Titles, (3d Ed.) side p. 384, top p. 379. The assessment and all the subsequent tax proceedings under which the tax deed purports to be executed contained no adequate description of the lands, and were therefore void. There was no valid judgment rendered against the land for the taxes of 1874; the judgment book did not comply with the law, as it failed to contain a record of the delinquent list, did not set out any state, county or other tax, and did not show any petition for judgment to have been filed by the collector. Blackwell on Tax Titles, 197. 198. The special execution was void. *Ewart v. Davis*, 76 Mo. 129. The tax deed recited that the sale by the collector was made under an execution dated August 9th, 1875. There was no execution of that date, and said deed was, therefore, void. *Williams v. McLanahan*, 67 Mo. 499. The tax sale was illegal, and the tax deed void, for the reason that the statute required the quantity of each tract, which should be sold for the taxes of the whole tract, to be noted opposite the tract on the special execution in the column provided for that purpose, and the law was not complied with in this particular. 2 W. S., p. 1200, § 196; *Donahue v. Hartless*, 33 Mo. 335; Blackwell on Tax Titles (3rd Ed.) p. 301.

L. F. Parker for respondent.

The description in the tax deed and other proceedings,

is not so indefinite as to render them void. *Cooley on Tax*, p. 284; *Shaw v. Orr*, 30 Ia. 355; *Bosworth v. Dauzier*, 25 Cal. 296; *Dunden v. Snodgrass*, 18 Pa. 15. Tax sales are like sales under execution, and it has always been the law of this state that however vague the description of the property given, if it could be identified when explained by facts *aliunde*, which facts were so generally known that the public would be presumed to know the property by the given description, then it was sufficient. *Bates v. Bank of Mo.*, 15 Mo. 309; *McPike v. Allume*, 53 Mo. 551; *Shewalter v. Pirner*, 55 Mo. 218; *Adkins v. Moran*, 67 Mo. 100. A recital in a judgment that due notice had been given is conclusive. 2 W. S., p. 1192, § 193; *Vorhees v. Bank*, 10 Pet. 449; *Raley v. Guinn*, 76 Mo. 263. It is not necessary for the collector to file a formal petition for judgment in addition to the delinquent list. 2 W. S., p. 1199, § 192. The failure of the clerk to specify opposite the tract sold, that the whole of it was sold, is not such an omission or irregularity as to avoid the sale. *Raley v. Guinn*, *supra*; *Negus v. Yancy*, 23 Ia. 416; *Wheaton v. Sexton*, 4 Wheat. 403; *Jackson v. Steinberg*, 1 John. Ch. 143; *Buchanan v. Tracy*, 45 Mo. 437; *Allen v. Moss*, 27 Mo. 354; *Scruggs v. Scruggs*, 41 Mo. 242; *Henderson v. Henderson*, 55 Mo. 547; 66 Mo. 272. All the proceedings in this case show the identity of the tract actually sold and intended to be conveyed, and it is the same land sued for here, and it is included in the description in the tax deed. Evidence *aliunde* is admissible to show the identity of the tract where a tax deed conveys more than the officer had the power to convey. 2 A. K. Marsh (Ky.) 553. Irregularities will be disregarded. *Thatcher v. People*, 79 Ill. 597; *Beers v. People*, 83 Ill.; *Goodwin v. Perkins*, 39 Vt. 598; *Adams v. Seymour*, 30 Conn. 402; *Huey v. Van Wie*, 23 Wis. 613.

SHERWOOD, J.—Action of ejectment for the recovery of the possession of the following described land situate in Franklin county, to-wit: “All that part of the northwest

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quarter of the northeast quarter of section 15, township 42, range 1, east, lying north of the Union Road, and west of the Atlantic & Pacific Railroad, (now St. Louis & San Francisco R. R.), and containing thirteen and 15-100 acres more or less." The reliance of the defendant is the insufficiency of the proceedings which resulted in the sale of the land, as well as the insufficiency of the description of the land in the tax deed made by the collector. The land was described in this deed as being in Franklin county. The clause of the deed reciting the judgment in favor of the State, and against the land, describes the land as follows:

Quantity.	Parts of Sections, etc.	No. of Section.....	No. of Township.....	No. of Range.....	Years for which taxes are due.....	Amount of taxes, interest and costs.....
Acres.	100ths.					\$ cts.
13	15	N. W. N. E. N. U. R.	1	42	1E.	1874.
		Clerk's fees.....				83 01
		Collector's fees....				10 10

And in the granting clause as follows, viz:

Fractional Part and Quantity Sold.	Parts of Sections, etc.	No. of Section.....	No. of Township.....	No. of Range.....
Acres.	100ths.			
13	15	N. W. N. E. North of Union Road.....	15	42
				1E.

The assessment, as shown by the tax-book, described land as described in the deed, except that under the heading, "Parts of sections" etc., these letters were used: "N. W. N. E. N. Union R. W. A. & P. R. R."

It is said in a work devoted to such subjects:

"The deed must give a certain description of the land conveyed, and conform in every respect to the mode of designation, pointed out by the local law of the State where it is executed, and of course, conform to the description adopted in the anterior proceedings. Blackwell on Tax Tit. 381. And it is held that the addition of a false particular in the description, which, in a deed between private individuals, might be rejected as surplusage, where the description without it would be certain, would vitiate the deed. *Ib.* In the case at bar, the description contained in the deed does not correspond with that adopted in the "anterior proceedings," and this, of course, vitiates the deed, and if a portion of a description in a deed cannot be rejected as surplusage, neither can any portion of the description in the prior proceedings be held as surplusage, as this would overthrow the rule of conformity announced above. But the description of the land contained in the deed, and the prior proceedings, is bad for another reason, that of uncertainty. Under the provisions of section 240, 2 Wag. St., 1212, letters might be used to indicate certain things, to-wit: "T. for township, R. for range, L. for lot, B. for block, N. for north, E. for east and W. for west, or any combination or combinations of the four last mentioned letters to denote parts of sections, lots, blocks, or other sub-divisions of real property." And that section further provides that, "any and all descriptions of real estate made under the provisions of this act, by the use of letters, figures and characters, as provided in this section, when so made that the land or lot may be identified and located, shall be deemed and held to be good, valid and complete, as though the same had been written out in full." It is quite obvious that under the maxim *expressio unius*, etc., letters can only be used in describing land, as provided in that section and not otherwise. It is equally obvious that when letters are so used they will fall short of the requirements of that section, unless the real estate intended to be designated by their use,

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is so designated thereby, "that the land or lot may be identified and located."

This identification or location cannot occur from the "anterior proceedings." What is meant by the letters, N. W. N. E. N. U. R., contained in that portion of the tax-deed which recites the description of the land against which judgment is rendered, certainly cannot be determined by any use of letters such as section 240, *supra*, warrants. Conceding that we might construe the letters N. W. N. E. to mean the northwest quarter of the northeast quarter, though they could as readily mean the northwest quarter and the northeast quarter, how shall the letters N. U. R. be interpreted? And if there was no sufficient description of the land in the "anterior proceedings," assuredly a good description in the tax deed could not retroact upon a prior bad description of the land and validate it. But the description in the deed itself, is not good.

There was no evidence tending to show that the land was known by the description set forth in the deed. Such evidence, perhaps, under the rulings in *McPike v. Allman*, 53 Mo. 551, and kindred cases, might have been sufficient, so far as concerns the bare deed, and have identified the land in the manner stated; but as there was no such evidence, the identity of the land cannot be ascertained, and this was the opinion of the county surveyor who testified in the cause in the trial court. The deed does not indicate in what part of the tract north of the Union road the 13, 15-100 acres are located. *City of Jefferson v. Whipple*, 71 Mo. 519; *Alexander v. Hickox*, 34 Mo. 496.

For these reasons, the judgment should be reversed and the cause remanded. All concur. HOUGH, C. J., absent.

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TIBBY V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant.*

1. **Negligence : RAILROADS : USAGE : PASSENGER.** It is competent for the plaintiff to show the usage of a railroad to transport its stock passengers on the top of its train, along the place of the accident, in an action against it for the death of plaintiff's husband, by negligence, who was, at the time of the injury, a passenger on its stock train and on top of one of its cars, and was thrown therefrom by the concussion resulting from the locomotive removing the slack of the train, preparatory to pushing it forward, and was killed.
2. **Railroads : PASSENGER : DEGREE OF CARE** Where a railroad undertakes to transport a stock passenger on the top of its train, it must manage and run the train with skill and prudence in order to prevent him from being thrown off. The degree of diligence and care in running and managing the train, must correspond in a measure with the mode of conveyance adopted by the company and the person to be conveyed.
3. **Common Carriers : NEGLIGENCE.** A common carrier is not permitted to stipulate against its own negligence. Especially is this true in its carriage of passengers.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. A. Andrews and Robert Adams for appellant.

It was error to permit the proof of the custom of stockmen to ride on the top of the cars. Such custom was not alleged in the petition, nor brought home to the knowledge of the deceased. The direction of the conductor to leave the caboose and go forward and get into a box car, was not the proximate cause of the injury. "The spontaneous action of an independent will intervened between the expulsion from the car and the injury." *Henry v. Railroad Co.*, 76 Mo. 294; *Wharton on Neg.*, 200, §§ 134, 138; *Haley v. Railroad Co.*, 21 Ia. 15; *Forsyth v. Railroad Co.*, 103 Mass. 510; *Frost v. Railroad Co.*, 10 Allen 387; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318; *Bancroft v. Railroad Co.*, 97 Mass. 275; *L. S. & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *B.*

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§ *P. R. R. Co. v. Jones*, 95 U. S. 439; also *Nelson v. Railroad Co.*, 68 Mo. 593. The court erred in overruling defendant's demurrer at the close of plaintiff's case. It was error for the court to refuse to admit the stock contract offered in evidence by defendant, and which entitled deceased to ride on defendant's trains.

Britton A. Hül, T. J. Delaney and A. R. Taylor for respondent.

This action is based upon the negligence of the carrier, and this cannot be stipulated against. *Graham v. Railroad Co.*, 66 Mo. 536; *Railroad v. Lockwood*, 17 Wallace, 357; *Railroad v. Stevens*, 95 U. S. 655; *Sturgeon v. Railroad Co.*, 65 Mo. 569; *Clark v. Railroad Co.*, 64 Mo. 447. This is the settled law of this State. Hence, the contract with Tibby was properly excluded by the court. It was entirely correct to show that the manner in which the defendant carried stockmen as passengers from Twenty-first street to the end of the journey, was on top of box cars, in order to show that Tibby was properly on top of the box car when knocked therefrom by defendant's negligence and killed. Hence, the admission of the testimony of the witnesses to show this fact was clearly right. The instruction given by the court, required the jury to find that Tibby's death was occasioned by the negligence of defendant's servants whilst managing its trains, before they could render a verdict against defendant. The instruction put the case to the jury upon the facts, and is beyond criticism. The point made by appellant, that the direction of the conductor to leave the caboose, and go forward, to get on or in a box car, was not the proximate cause of the injury, is too obscure to be understood. Nobody ever contended that such direction was the proximate cause. The proximate cause of the injury was the reckless negligence of defendant's servants, in causing the different portions of the train

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to be struck together with such force as to cause the stock passenger to be knocked off the train.

MARTIN, C.—This was an action under the statute to recover damages for an injury resulting in the death of plaintiff's husband. It is alleged in the petition that the defendant accepted Matthew Tibby, husband of plaintiff, as a passenger on its train, laden with live stock, and undertook to carry him safely from Sedalia to St. Louis at its union depot; that in pursuance of such undertaking defendant carried said Matthew as far as Twenty-first street in St. Louis where defendant by its servants directed said Matthew to leave the caboose car in which he had ridden as passenger thus far on his journey, and to get upon the top of a car of said train to be there carried to the end of his said journey; that in pursuance of said direction said Matthew did get upon the top of a car of said train to be there carried to the end of his journey; that while said Matthew was on the top of said car the agents and servants of defendant in charge of its said train did carelessly and recklessly cause said train, while it was moving eastward, to be suddenly and violently slacked up, whereby said Matthew, without any fault or negligence on his part, was violently thrown from said car in front of said train where the wheels of the cars passed over him, inflicting such injuries upon him that death resulted therefrom.

The defendant answered by denying the facts alleged in the petition and charging contributory negligence on the part of plaintiff. The trial resulted in a verdict of \$5,000 for plaintiff, from which the defendant has appealed, accepting an affirmance *pro forma* in the St. Louis court of appeals.

It appears from the evidence that Matthew Tibby was the husband of plaintiff and that he was accepted at Sedalia as a person in charge of stock on board of the train to be transported to St. Louis at its union depot. The accident which resulted in his death is graphically stated in the ev-

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idence of Peter J. Hudson, a fellow traveler, who was an eye-witness, as follows :

"I reside in Neosho county, Kansas; I was acquainted with Matthew Tibby in his lifetime; I knew him on or about the 16th day of June, 1879; I was with him in St. Louis, Missouri, on Twenty-first street at that time, the 16th day of June, 1879; we started from here, from Osage, Missouri, on the night of the 14th day of June, 1879; we started from depot with stock; we reached St. Louis June 16th, 1879, about 5 o'clock in the morning, met after 5 o'clock in the morning. The weather was rather misty and foggy on that morning; it was just getting daylight when we arrived in St. Louis; it was not daylight yet, not light as it is now; we were on the Missouri Pacific Railroad. When we got at Twenty-first street in St. Louis, the train stopped there; the conductor said that was as far as the caboose went, that we would have to go through the tunnel in a box car, up next to the engine. There was some four or five of us in the caboose at the time; Mr. Tibby, Mr. Welsh and myself got out of the caboose and started for the front of the train; they went out on the left-hand side; they were rather ahead of me; I was on the opposite side of the train from them, going along looking at the hogs I had charge of, trying to see how many there were dead; and when I got to the front end of the train they were on top of the front stock car and motioned to me to come up. They said there would be a box car in there to go through the tunnel in. When I got up on top of the car I went up to where they were standing; I sat down about four or five feet from the front end of the car; had not been sitting there but about a minute and the engine came in from the rear and struck the rear end of the train and gave a very hard jar. Mr. Tibby was in the act of sitting down when the jar came. He, Tibby, standing to my right at that time, and Mr. Welsh to my left, one on each side of the foot board on the top of the car; I was sitting on this board. When the jar came it threw me in the same direc-

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tion it did Mr. Tibby and Mr. Welsh; we all went together when the jar came, and Mr. Tibby went so far he could not catch his balance; I expected to see Mr. Welsh go at the same time, but he did not; I think as Mr. Tibby saw he had lost his balance he went to jump; he lit, I suppose, about four feet ahead of the car. Mr. Welsh, who was standing up hallooed at him to get out of there quick. He, Welsh, turned around and said, my God; and by the time he said this the wheels were going over Mr. Tibby. I got down off the cars; by the time I got around to where Mr. Tibby was, there was two or three men there to take Mr. Tibby out; they had to start the train backward in order to get his body out, as it was under the truck, and they could not get it out without moving the train; he lived about five minutes after he was taken out; they sent for an ambulance. The train we were on consisted of about eighteen or twenty cars; we were on the east end of the train when he was killed; it was standing still when we got up there; the locomotive struck the west end of the train; I did not see any box car in front of us; the engine was cut off; I saw the train as it was moving away; I did not see any empty box cars in front, I could not see any; Mr. Welsh and one of the other stockmen was on the cars when the train moved away; Mr. Welsh was standing on the top of the car from which Tibby was thrown, as the train went away; I can't say how Mr. Tibby and Welsh came to be on top of the train; they were there when I got there; at the time I got upon the car where Tibby was, there was another man on the top of the train, about the middle of the train; I suppose he was a stockman; it was one of the men I saw in the caboose; he was not a train man; I think at the time of the jar, Tibby was on the right of me and Welsh was on the left, a little in front of me, not much forward of me; I was sitting down, Welsh was standing up erect and Tibby was rather in the act of sitting down; I was not expecting such a blow; the blow threw me forward about half way over; I had my

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grip sack down there and that did not not let me go as far as I would; I threw my hand forward on the car to stop or prevent my falling over. The jar threw Mr. Welsh pretty close to the edge of the car; I thought it was a pretty heavy blow, heavier than usual while coupling cars; it made the cars rattle considerable. One pair of trucks ran over Mr. Tibby, and the first wheel of the second pair was standing on him. This was my first trip as a stockman."

The plaintiff submitted in evidence the testimony of A. Letcher and M. L. Fox who were stockmen; also, the testimony of John O'Leary, a coal dealer, and resident near 21st street, and of John W. Campbell, a sergeant of police, all of whom were familiar with the way in which the defendant transported stockmen as passengers from Twenty-first street to the Union depot. According to their concurring evidence it had been the usage of the company for many years to cut off the caboose car containing the stockmen as soon as the incoming train reached High or Twenty-first street; the men in charge of their stock were then required to get upon top of the train for the purpose of completing their journey to the Union depot, or the tunnel; there were no seats on top of the cars and the men being transported either stood up or sat upon what is known as the foot board, that is the board about ten inches wide running the length of the top of the car in the center thereof, upon which the employes of the train pass to and fro on the top of the train. This was the only accommodation furnished by defendant for the transportation of stock passengers from Twenty-first street to the Union depot or to the point at which the transfer lines meet the train to carry it through the tunnel. They either had to ride in this manner or walk the distance of about half a mile over a net-work of railroad tracks occupied with moving trains. This evidence was all objected to by defendant.

On the part of defendant, the only evidence produced consisted of the contract usually existing between the com-

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pany and stock passengers. This contract was signed by Matthew Tibby as a passenger in charge of stock, and contained a clause reciting that in consideration of a free passage over the road the company should be exempt from liability for any injury suffered by him on the road while in charge of his stock. On objection of plaintiff this contract was excluded from the jury. The defendant then asked an instruction in the nature of a demurrer to the evidence and pleadings which was refused. Defendant, also, asked the court to instruct the jury to exclude from their consideration all testimony showing, or tending to show the custom or manner in which any other person than deceased rode upon defendant's stock trains; which request was refused. On the part of plaintiff the court gave the following instruction:

The court instructs the jury, that if they find from the evidence in this case, that on or about the 15th day of June, 1879, the defendant was a common carrier of freight and passengers between Sedalia, Missouri, and St. Louis, Missouri, and that on said day the defendant accepted Matthew Tibby as a passenger upon its car used and operated by defendant, to be carried by defendant as such passenger, from Sedalia, Missouri, to St. Louis, Missouri, and if the jury believe from the evidence that defendant did carry said Matthew Tibby as such passenger on its said train to Twenty-first street in St. Louis, Missouri, on the line of defendant's railway, and that defendant there required said Matthew Tibby to leave the car on which he had ridden thus far on his journey, and to get upon the top of one of the cars operated by defendant, to be thus carried to the end of his destination as such passenger. And if the jury believe from the evidence that whilst said Matthew Tibby was upon the top of said car, he was thrown from the said car and killed without negligence on his part, and if the jury believe from the evidence that said Matthew Tibby was so thrown from said car and killed, through the negligence or unskillfulness of defendant's agents, servants

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or employes, whilst running, conducting or managing said train of cars, in causing said train whilst moving to be stopped with a sudden jerk or shock; and if the jury believe from the evidence that Rachael Tibby was the lawful wife of Matthew Tibby at the time of his death, then the jury should find for the plaintiff in the sum of \$5,000.

The jury then rendered the verdict appealed from.

In reviewing the record it is unnecessary to consider anything outside of the points urged by defendant for a reversal of the judgment. It is objected that the court erred in admitting the evidence relating to the prevailing usage of the company in transporting its stock passengers from Twenty-first street to the Union depot in St. Louis. This objection is not well taken. It was competent to prove this usage in order to overcome any inference of contributory negligence on the part of the deceased in being in such an exposed place as the top of the train. Presumably this was no place for a passenger to be. But he was in a proper place if this was the only place provided by the company for his accommodation. Moreover, if this was the place in which the defendant was in the habit of transporting its stock passengers, the deceased was properly there along with the other stock passengers without any express direction of the defendant to go there. The usage operated as a standing license to be there, in the absence of an express order or direction to the contrary. In this view of the case, an express direction to the deceased to go there was superfluous. I will not stop to consider the point, as to whether the company had an actual knowledge of its own usages. Again, it was competent in support of the allegation of an express order or direction to go there. The witness, Hudson, testified that the conductor said "that was as far as the caboose went, that we would have to go through the tunnel in a box car up next to the engine." On cross-examination the witness reports the conductor as saying "we must get out of the caboose and go

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forward and get in a box car and go through the tunnel." The usage shows to what place forward he was thus directed to go in order to board the box car when it came to the train or the train came to it preparatory to entering the tunnel. The usage explains the direction he received and goes to support the allegation in the petition that he took his place on top of the train in pursuance of an express direction to that effect. No good reason is urged in support of a demurrer to the case as made in the evidence and pleadings.

The character of conveyance provided by defendant for transporting the deceased, was before the jury, and it was for them to determine whether it was reasonably safe or not. Having undertaken to transport him on the top of the train, along with other stock passengers, it was their duty to manage and run the train with skill and prudence in order to prevent him from being thrown off. The degree of diligence and care in running and managing the train had to correspond, in a measure, with the mode of conveyance adopted by the company, and the person or thing to be conveyed. There might be great negligence in subjecting a train, conveying passengers on top of the cars, to certain jerks and bumps which could not affect the safety of passengers transported in inclosed cars. All the facts disclosing the mode of conveyance and the way in which the train was managed at the time of the accident, were given to the jury. They found that the deceased lost his life by the negligent acts of the defendant, and as the evidence contained facts from which negligence could reasonably be inferred, no relief can be expected in an appellate court from the effect of their verdict.

The contract of exemption from damages was properly excluded. A common carrier is not permitted to stipulate against its own negligence. *Clark v. Railroad Co.*, 64 Mo. 447; *Sturgeon v. Railroad Co.*, 65 Mo. 569; *Graham v.*

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Railroad Co., 66 Mo. 536. This rule in its application to the carriage of passengers, has never been relaxed.

The judgment is affirmed. All concur, except NORTON and SHERWOOD, JJ., absent.

ERSKINE, *Appellant*, v. LOEWENSTEIN.

1. **Corporation: STOCKHOLDER: MOTION FOR EXECUTION: PRACTICE.** A motion under the statute, (Wag. Stat., p. 291, § 18,) by a judgment creditor of a corporation, for execution against a stockholder for an unpaid subscription to its stock, is a substitute for a bill in equity to reach assets in the hands of the stockholder; the refusal of the court to grant the motion is a finding of the issue for the defendant, and the remedy for error of the lower court in that regard is by a motion for a new trial and exception to the action of the court in overruling the latter motion.
2. — : — : — : —. It is not necessary that the bill of exceptions should show that the creditor excepted to the action of the court in overruling the motion for execution against the stockholder.
3. **Execution against Stockholder: TRIAL: STATUTE.** The statute relating to such execution against a stockholder, contemplates a hearing and determination of the motion by the court, without the intervention of a jury.
4. **Stock: UNPAID SUBSCRIPTION: PURCHASER.** One is not liable to such action by the creditors of a corporation for an unpaid subscription to its stock, who purchased from a former holder for value and without knowing or without inculpatory negligence in not knowing that it was so unpaid for.
5. **Stockholder: ESTOPPEL.** One who voluntarily places himself on the books of a corporation as the owner of its stock, will be estopped to deny his title thereto as against its creditors.
6. **Equity: PRACTICE IN SUPREME COURT.** Even in equity in cases of conflicting evidence, the Supreme Court will defer to the finding of the trial judge.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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C. S. Hayden for appellant.

This case comes before this court as a non-jury or equity case. The court below passed upon the facts as a court, and not as a jury, and the question is whether the finding was a right finding. The finding of the trial court was not only against the evidence, but was against the weight of the evidence. The question is not how the respondent originally received, but how he afterwards held the stock. But even by the first agreement, a holding other than as collateral was provided for, and this other holding took place. By his own contract with Popper, respondent made himself liable. Independent of any such contract, respondent is liable by estoppel. His course of conduct, his acts and representations fix this liability upon him. *Griswold v. Seligman*, 72 Mo. 110. The respondent did not hold the stock as a purchaser in good faith and for valuable consideration, and cannot shelter himself under the decisions which relate to such parties.

Rombauer & Goldsmith for respondent.

The failure of the appellant to except to the action of the court in overruling his motion for execution, is fatal. *Bateson v. Clark*, 37 Mo. 31; *City of St. Joseph v. Ensworth*, 65 Mo. 628. The appellant has not made out a case, (1) Because he failed to show by proper evidence that the stock for which certificate No. 28 was issued to Edwards, was a part of that for which certificate No. 22 had been issued to Ashcroft. (2) Because there is no evidence whatsoever that the stock transferred by Popper to Loewenstein was the same for which certificate No. 28 was issued to Edwards. A purchaser or holder of stock who, in good faith, acquires it as full paid, cannot be held liable for amounts which are in fact unpaid thereon, if it was issued or is represented by the corporation to be full paid. *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Foreman v. Bigelow*, 4 Clif.

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508; *Skrainka v. Allen*, 76 Mo. 392; *Brant v. Ehlen*, 59 Mo.

1. The testimony of Edwards as to whether Popper acquired the stock in good faith as full paid, was a mere deduction or inference on his part, and was incompetent. 1 Wharton Ev., §§ 508, 509. The finding of the trial court on the issue is conclusive. *Chapman v. McIlwrath*, 77 Mo. 43. The fact that Loewenstein acquired the stock as full paid, is a sufficient defense.

PHILIPS, C.—Plaintiff, on the 15th day of February, 1876, recovered judgment against the Gravois Railroad Company, a corporation under the laws of this State, for the sum of \$5,879 61. On return of execution, *nulla bona*, plaintiff, in 1877, began proceedings in the circuit court of St. Louis county, against the defendant, as a stockholder in said company, to realize his said judgment. This proceeding was discontinued by plaintiff. Afterwards, on the 24th day of January, 1880, he began the present proceeding by motion in the circuit court for the same purpose. There is no question made as to the act of incorporation of said company, and the existence and validity of plaintiff's judgment. The contention is, as to whether the defendant was the owner of unpaid stock in said concern.

The plaintiff's evidence sought to show that 1,000 shares, at \$50 a share, of the company's stock, were issued to one Ashcroft; that one Edwards became the holder of 100 shares of this 1,000, which he transferred to one Popper; and that the defendant acquired the same from Popper. He further contends that the company never was paid for said stock, and that all the holders thereof had notice of this fact when they obtained the shares in question. The evidence showed that some time in the fall of 1873 Popper, who was cashier of the bank of Taussig, Gemp & Co., borrowed of the defendant the sum of \$2,000 and transferred to him as collateral security for said loan, the said shares of stock. The certificate, therefore, was re-issued in the name of Loewenstein, and so continued in his name on

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the books of the company. About six months after the loan of this money, Popper repaid the same to defendant. It seems that at that time the said concern of Taussig, Gemp & Co. was in financial trouble. Whether Popper was involved personally in this embarrassment, does not affirmatively appear in this record. At all events, instead of having Loewenstein retransfer the said stock to him, upon satisfaction of the debt for which it was held, Popper requested defendant to retain the stock in his name and sell it for him. When the first movement was made against defendant, as such stockholder, by plaintiff in 1877, on advice of his counsel, he signed the blank transfer on the back of the certificate and delivered it to Popper, who thereafter held the same; but no transfer thereof from defendant to Popper was made on the books of the company. They continued to show that defendant was the owner. The defendant seeks to explain this omission by showing that the company ceased to do business or have any office, and that the books were taken into legal custody and held by one Harrison, an attorney at law representing claims against the insolvent company. But there was a period intervening between the payment of Loewenstein of the money borrowed by Popper and the dissolution or suspension of business by the company, when defendant might have made such transfer of his stock to Popper. On the contrary he consented to hold it for Popper until he could sell it.

Defendant's evidence tended to show that Popper was an innocent purchaser for value, and that defendant took and held the same, as aforesaid, without any notice that it was not "paid up stock." The circuit court found the issues for defendant and refused the motion. Plaintiff appealed to the court of appeals, where the judgment of the lower court was affirmed. He brings the case here on appeal from the court of appeals.

I. Respondent objects to the consideration, by this court, of any imputed error of the trial court for the rea-

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son that the bill of exceptions does not show that plaintiff excepted at the time to the action of the court in overruling the motion for execution against the defendant. We think this is a misapplication of the rule invoked by respondent. That rule applies to motions such as are incidental to the trial of the principal proceeding, and not to a case like this where the motion is the principal proceeding, the foundation of the litigation. This motion takes the place, under the statutory provision, of the suit in equity, at common law, to reach assets in the hands of the stockholder; and, to a certain extent, should be treated as a petition. The refusal of the court to grant the motion is a finding of the issue for the defendant. The remedy for the error of the court in making such finding is by motion for new trial and exception, at the time, to the action of the court in overruling this motion, as was done in this case. A more serious question might be as to whether the motion for the execution should not be preserved in the bill of exceptions in order to make it a part of the record. *London v. King*, 22 Mo. 336; *Corby v. Tracy*, 62 Mo. 515. We will give the appellant the benefit of this mere doubt.

II. Question is also raised by counsel as to whether this case on appeal, should not be treated as a trial at law; and as no questions of law were raised by instructions, the only inquiry here should be, was there any evidence to support the finding of the court? If there was any such evidence, respondent contends, the finding of the trial court on the evidence is conclusive on this court. As above suggested, this proceeding by motion is summary and we are disposed to treat it, in this respect, as a statutory substitute for a bill in equity. The statute, evidently, contemplates a hearing and determination of this motion by the court without the intervention of a jury. *Hensley v. Baker*, 10 Mo. 157, 158.

III. We are disposed on the evidence, to accept as correct the plaintiff's claim that this case should be treated as if it were a proceeding directly against Popper, instead

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of Loewenstein. Conceding that so long as defendant held the stock as collateral security he was a *bona fide* holder for value, and as such would be protected as provided by section 9, p. 301, Wag. Stat.; yet the moment Popper repaid him the principal debt, his rightful custody of the stock ceased, so far as the original contract under which he took it is concerned. After that time he consented to, and did hold it for the benefit of Popper, and to protect him under circumstances of known doubtful integrity. He permitted this stock to remain on the books of the company in his name as the ostensible owner before the world. Having thus voluntarily put himself forward as the apparent owner of this stock in Popper's interest, he should not, as against the creditors of the corporation, be heard to deny his title when sued by such creditor. *Griswold v. Seligman*, 72 Mo. 110. Thus fixing him in the shoes of Popper, the remaining question is, does the evidence satisfactorily demonstrate that Popper is liable? Although this stock may not have been paid for by the party or parties under whom Popper took as purchaser, yet, if he took without notice of that fact, and was a purchaser for value, free from inculpatory negligence in not knowing, he is not liable to this action. *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 497; *Skrainka v. Allen*, 76 Mo. 392. Plaintiff asserts that this stock is a part of the 1,000 shares issued to Ashcroft. The chain of evidence by which it is sought to so connect these shares is not entirely complete under strict rules of evidence. But conceding, for the purpose of this investigation, that plaintiff is right as to the origin of this stock, is his case made out? This Gravois Railroad was a corporation under the statute of this State. As such it was required by the law of its creation to keep, and it did keep, books of record wherein were entered its corporate proceedings. The same logic by which plaintiff's counsel would affix to defendant the ownership of the 100 shares of stock would establish that the 1,000 shares of the Ashcroft stock were paid up in full.

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A party desiring to make purchase of stock would be referred to the company's records for evidence. Unless there be some proof of some fact or circumstance *in pais*, brought to Popper's attention before making his purchase, impeaching the integrity of the record, he would have been justified in acting upon its apparent correctness. This record of May the 20th, 1873, contained the following entry :

"The treasurer reported that he had received from Mr. Ashcroft, on May 15th, the sum of \$50,000, and in accordance with the resolution of May 9th, had delivered to Mr. Ashcroft 1,000 shares of the paid up stock of the capital stock of this company."

This entry is subscribed to and attested by John V. Hogan, as secretary, and James Edwards, president *pro tem*. The stock record contained the following entry :

"Certificate, No. 22, name James E. Ashcroft, number of shares 1,000, par value, \$50,000, amount paid in \$50,000."

It is claimed by plaintiff that this certificate No. 22 was cancelled and certificates running from 23 to 34 issued in lieu thereof, of which said Edwards got from Ashcroft certificate No. 28, which is the certificate representing the 100 shares in controversy. If this be true this same stock book contains this entry :

"Certificate, No. 28, name James Edwards, number of shares 100, par value \$5,000, amount paid in \$5,000."

What fact was developed at the trial to satisfy the mind of the judge that Popper, when he bought from Edwards had any notice that this stock was never paid for by the holder of the certificate? The evidence relied on by plaintiff is that of said Edwards, who stated that : "Mr Popper, of course, knows that the stock was not fully paid stock. That is, paid up on the books. I represented to him that the stock was issued full-paid, but I wouldn't represent to him that I would pay the stock up in full. When I sold stock to Popper I represented to him that the stock was all issued full-paid." Upon what Mr. Edwards

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based his conclusion is not stated. This statement is little more than the mere inference of the witness. Witness should state facts and circumstances. It is the province of the court or jury to draw the conclusion. *Sparr v. Wellman*, 11 Mo. 230. The witness, however, went further and informed the court about what he did state to Popper, and we are to infer that, in the opinion of the witness, his statement to Popper was of such a character as should have conveyed to him the idea that the stock, in fact, was not paid for. He said: "I represented to him that the stock was issued full-paid." The further language of the witness: "I would not represent to him that I would pay the stock up in full," is the mere assertion as to what he did not say, and not that he used that expression in negotiating the sale. For it is observable that the witness follows this up with what he did say: "When I sold stock to Popper I represented to him that the stock was all issued full-paid." It may be true, as suggested by the learned counsel, that the expression is susceptible of a double meaning, and might well consist with the fact that the stock was not actually paid for to the company. But, on the other hand, why should such language excite the apprehensions of a gentleman purchasing from Mr. Edwards? The records of the company, kept under the law, and the auspices of Mr. Edwards, stated that the company "had received from Mr. Ashcroft the sum of \$50,000, and in accordance with resolution they had delivered to him 1,000 shares of the paid up stock of the capital stock of this company." Then when a party, as in the case of Popper, went to this same Mr. Edwards to buy stock and was told by him that "the stock was issued full-paid," why should he impute to this language any meaning inconsistent with the personal and official integrity of Edwards? Why should he or the court infer from this that the officers of the corporation were violating their duty in keeping false and misleading records? Superadded to this, Mr. Popper testified as follows: "Q. State whether or not it was

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sold to you as paid up stock by Mr. Edwards? A. I bought the stock as full paid up stock. Q. Did you know that it was not paid up stock? A. I did not. Q. Had you any knowledge, or information, or any notice of the fact that it was not paid up stock? A. I did not."

Under this state of the evidence we do not feel justified in reversing the conclusion reached by the trial court. The witnesses were before the court and presumably known to the judge. In the matter of the credibility of the witness and the weight to be attached to their statements in a conflict of testimony, this court, even in chancery cases, defers to the more favoring opportunities of the trial judge for determining which way the beam in the scale of justice inclines. *Chouteau v. Allen*, 70 Mo. 336; *Chapman v. McIlherath*, 77 Mo. 43.

It follows that the judgment of the court of appeals should be affirmed. EWING, C., concurs. MARTIN, C., not sitting. HOUGH, C. J., absent.

SCHWEITZER, *Appellant*, v. THE CITY OF LIBERTY.

1. **City of Liberty:** CHARTER OF: POWER TO REGULATE SALE OF INTOXICATING LIQUOR. The city council of the city of Liberty had authority under its charter, (Acts 1860, 1861, pp. 213, 227; also Acts 1874, p. 336,) to pass an ordinance providing that no person should, directly or indirectly, sell or give away any intoxicating liquors in any quantity less than one gallon within said city, without taking out a license as a dramshop keeper, and that any person violating said ordinance should be deemed guilty of a misdemeanor, and upon conviction, be punished by a fine of not less than \$10 nor more than \$90.
2. **Municipal Corporation:** POWER TO TAX AND RESTRAIN SALE OF INTOXICATING LIQUOR. The power given to a city to tax and restrain the sale of liquor, includes the power to grant licenses.
3. **Ordinance:** PUBLICATION. Where a city charter provided that "all ordinances passed by the city council within thirty days after they

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become laws, shall be published, * * but the failure to publish * * shall not render void or affect the validity of any such ordinances, unless delay may cause such ordinances to act retrospectively on the rights of individuals." An ordinance passed by the city council goes into effect and becomes a law, notwithstanding the want of such publication.

4. **Jurisdiction.** The recorder of the city of Liberty has jurisdiction of offenses arising under the ordinance involved in this case.

Appeal from Clay Circuit Court.—J. W. JENKINS, Esq., Special Judge.

AFFIRMED.

Hamner & Burris for appellant.

The ordinance was illegal and void. *Dillon on Mun. Corp.*, § 55, note 1; *Ibid* §§ 251, 298, 302; *Jefferson City v. Courtmeyer*, 9 Mo. 692; *Com. v. Turner*, 1 Cush 493. The ordinance was not published as the charter required and was, therefore, inoperative at the time the prosecutions complained of were had against plaintiff. Acts 1874, § 37; *Dillon on Mun. Corp.*, § 265; *Barnett v. Newark*, 28 Ill. 62; *Conroy v. Iowa City*, 2 Clarke 90; *Higley v. Bunce*, 10 Conn. 435; 46 N. Y. 42; 60 N. Y. 457; 62 N. Y. 224; *Ex parte Winsor*, 3 Story 411; *Ruggles v. Collier*, 43 Mo. 365; *St. Louis v. Clemens*, 43 Mo. 395. The recorder had no jurisdiction of this class of cases. R. S. § 5451; *City Charter*, Art. 7, § 26; Acts 1868, p. 221, § 12; R. S. 1879, § 5449. The money paid for fines can be recovered back, 2 Greenlf. on Ev. § 121; 2 Chitty on Cont. p. 947; *Richardson v. Duncan*, 3 N. H. 508; 8 N. H. 386; *Clafin v. McDonough*, 33 Mo. 412 and other authorities.

L. W. Newman and *Simrall & Sandusky* for respondent.

The city was authorized by its charter to pass the ordinance in question. *Charter*, Art. 3, § 1; *Black v. Jack-*

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sonville, 36 Ill. 301; *Goddard v. Jacksonville*, 15 Ill. 588; *Byers v. Trustees*, 16 Ill. 35; 21 Ill. 464; *City of St. Louis v. Bentz*, 11 Mo. 61; Dillon on Corp. (2nd Ed.) § 299; *Heisenbrittle v. City Council*, 2 McMullen (S. C.) Law 233; *City Council v. Ahrens*, 4 Strob. (S. C.) 241; *St. Louis v. Cafferata*, 24 Mo. 94. The power to license and regulate was not taken away by section 12 of the Amendatory Act, of March 25, 1868, amending section 26, article 7 of original act. There is no maximum penalty, fine or forfeiture fixed by the General Statutes for violating the city ordinances. The offenses are distinct. 1 Dillon on Corp. § 302 and note: *Mayor, etc. v. Allaire*, 14 Ala. 400; 8 Ala. 615; 17 Md. 331; 24 Mo. 94; *St. Louis v. Bentz*, *supra*; *Connor v. Railroad Co.*, 59 Mo. 285; *State v. Debar*, 58 Mo. 395. The ordinance was published. It was passed on the 1st of February, 1878, within thirty days after it was published in a newspaper printed in said city of Liberty, according to the uniform custom, and the printer's bill was presented to and paid by the city council, whereby the publication in that mode was ratified. The publication was not necessary to the validity of the ordinance, but it took effect, when passed and duly signed. See sections 35, 37, Act of 1874. The clause in reference to publication was directory and intended for information. *City of Cape Girardeau v. Riley*, 52 Mo. 424.

EWING, C.—This was a suit brought by plaintiff, before a justice of the peace, to recover of defendant, the appellee, certain amounts paid by her as fines and costs to the officers of the city of Liberty, under a certain ordinance of the said city in relation to the sale of intoxicating liquors, which ordinance, she claims, was void and illegal, and said sums exacted from her under duress, and to prevent the seizure of her goods and the arrest of her person. Judgment was rendered against her in the justice's court, when she appealed to the circuit court of Clay county, Missouri,

where she was again unsuccessful, and she brings the case here by appeal.

There was no dispute as to the facts, and the plaintiff asked four instructions; two of which, the third and fourth, it will be alone necessary to notice, as upon their correctness the whole case turns. They are as follows:

3. That under the charter of the city of Liberty and the pretended ordinance, the recorder of said city had no jurisdiction of the causes of action of the mayor, councilmen and citizens of the city of Liberty against Mary Schweitzer, and set out in plaintiff's statement, and that if Mary Schweitzer paid the sums as sworn to by witnesses, Wymore and Reed, upon compulsion and to prevent the immediate seizure of her goods and the arrest of her person, and that the same were paid to the city aforesaid, for its own use, the court will find for the plaintiff in the sums so testified to by witnesses, Reed and Wymore.

4. Plaintiff asks the court to declare the law to be that the ordinance, entitled "An ordinance in relation to the sale of intoxicating liquors," passed by the city council of the city of Liberty, February 1st, 1878, and under which the proceedings complained of in this petition were had, is null and void, for the reason that the said city council had no power under the charter of the city of Liberty to pass said ordinance, and for the further reason that said ordinance was not published in compliance with the provisions of said charter.

I. It is insisted by the appellant that it was not in the powers granted to the corporation by its charter to regulate the sale of intoxicating liquors. The power granted by the legislature was as follows:

"14th. To license, tax and regulate auctioneers, grocers, merchants, retailers, dramshop keepers, ordinaries, taverns, druggists and apothecaries." Again:

"6th. To make regulations to secure the general health of the inhabitants, and to abate, prevent and remove nuisances." Again:

"24th. To regulate the police of the city, to impose fines, forfeitures and penalties for the breach of any ordinance, and provide for the recovery and appropriating such fines and forfeitures, and the enforcement of such penalties." Again :

"31st. To make such general rules, regulations, by-laws and ordinances for the purpose of maintaining the peace, good government and order of the city of Liberty, and the trade and manufactures thereof as the city council may deem expedient, and for that purpose may make and enforce any ordinance or ordinances for the apprehension and holding in custody of all or any offenders against the laws of said city, until the said offender or offenders can be brought to proper trial, and may enforce the observance of all laws, rules, regulations, by-laws and ordinances which may be passed by said city council under this act, by inflicting penalties upon any person or persons for the violation of any ordinance or law, not exceeding \$90, for any one offense, to be recoverable, with costs, in an action of debt, by and in the name of "the mayor, councilmen and citizens of the city of Liberty," for the use of the city, before the city recorder or any justice of the peace residing in the limits of said city, having jurisdiction of the same." And:

"32nd. To make all ordinances, subject to the restrictions in the last preceding sub-division of this section specified, which shall be necessary and proper for carrying into effect the powers vested by this act in the corporation, the city government or any department or office thereof."

"Article 7, section 40. The city council shall have power at any time to order an election to test the sense of the qualified voters residing within the limits of the city of Liberty, upon the subject of licensing groceries, dramshops, taverns and inns, for the purpose of vending at retail spiritous or vinous liquors, or either of the above-named houses, and also on the subject of licensing billiard tables within the limits of the city; such election shall be governed by such rules and conducted in such manner as the city coun-

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cil may prescribe." Acts 1860, 1861, p. 213, § 1, sub. 14 and p. 227, art. 7, § 40; also, Acts 1874, p. 336, sub. 6, 24, 31 and 32.

Then under that authority the city of Liberty adopted an ordinance as follows: "Sec. 1. No person shall directly or indirectly sell or give away any intoxicating liquors in any quantity less than one gallon, within the city of Liberty, without taking out a license as a dramshop keeper," etc., and then providing that any person violating this ordinance "shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of not less than \$10, nor more than \$90."

The question is, under the legislative power above conferred, did the city of Liberty have authority to enact the ordinance complained of. In the *City of St. Louis v. Bentz*, 11 Mo. 61, the legislature had granted the power "to regulate the police of the city," and the city passed "an ordinance respecting vagrants," under which Bentz was proceeded against and fined. He moved to quash the information against him for the reason "that the ordinance of said city under which the complaint is made, is void, the city having no power by its charter to pass such ordinance." This court held the power sufficient, and that the ordinance does not conflict with the general law concerning vagrants. In the *City of St. Louis v. Cafferata*, 24 Mo. 94, the power granted was "to make such rules, regulations, by-laws and ordinances for the purpose of maintaining the peace, good government and order of the city, and the trade, commerce and manufactures thereof, as they may deem expedient, not repugnant to the constitution and laws of this State." Under this power the city passed an ordinance prohibiting any one after a certain hour, from keeping his store, shop or other place of business open on Sunday. The defendant Cafferata was tried and fined thereunder, and this court held the power properly exercised. In *State v. Cowan*, 29 Mo. 330, the same general doctrine is maintained. In *St. Louis v. Smith*, 2 Mo. 113, where there was charter power

to "restrain and prohibit tippling houses," the corporation was held entitled to license. The power to tax and restrain the sale of liquor includes the power to grant licenses. *Mt. Carmel v. Wabash Co.*, 50 Ill. 69; *Byers v. Olney*, 16 Ill. 35; *City Council v. Ahrens*, 4 Strob. 241; 2 McMullen 233.

It would seem from these authorities that the respondent had abundant authority to adopt the ordinance, and that unless otherwise void, it must be held to be a valid and legal enactment under which appellant could be prosecuted.

II. The next proposition of the appellant is that "the ordinance was not published as the charter required and therefore inoperative." The charter itself provides: (sec. 37, Acts 1874, p. 339.) "All ordinances passed by the city council, within thirty days after they become laws, shall be published, * * * but the failure to publish * * * shall not render void or affect the validity of any such ordinance, unless delay may cause such ordinance to act retrospectively on the rights of individuals." It is not insisted that the ordinance acted retrospectively, but only that, not having been published within thirty days after it went into effect, that it was dormant and a prosecution could not be maintained by its authority. In other words appellant holds that the ordinance was passed by the city council, and had become a law, but not having thereafter been published, it is therefore dormant. We cannot agree to this interpretation of section 37, but on the contrary, we hold that it was in force, notwithstanding its want of publication, and the only advantage appellant could take of the fact, if it be a fact, is that it had acted retrospectively on her rights, which was not attempted. But the evidence strongly tended to show that the ordinance was published as required.

III. It is insisted by the appellant that the city recorder had no jurisdiction of this class of cases. The charter of the city of Liberty, (Acts 1861, p. 224, § 26) is as follows: "All persons charged with and convicted of

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any misdemeanor shall be punished as is herein directed and provided, when such misdemeanor was committed within the limits of the city of Liberty; and all laws, punishments, fines, forfeitures or costs provided or inflicted under the laws of the State of Missouri shall be null and void for any such misdemeanor when it shall appear from the indictment or the evidence of the commission of such offense that the same was committed within the limits of said city; the true intent and meaning of this act being, that all charges of misdemeanor as herein defined, when committed within the limits of said city, shall be punished only in manner and form as defined and described under this act, and the laws or ordinances of said city council, within their authorized legislative authority."

Which was afterwards amended by tacking thereto the following:

"Provided, however, that the recorder shall have no greater jurisdiction than justices of the peace in similar cases, and shall have no authority to try and punish offenders where the maximum penalty, fine or forfeiture fixed for the offense by the general statutes of the State exceeds the sum of \$100." Acts 1868 p. 221, § 12.

It is further provided in section 15, Art. 4, p. 217, Acts 1860 and 1861, that the recorder "shall have the same jurisdiction as justices of the peace," and exclusive jurisdiction over all cases arising under any ordinance of the city, subject to appeal to the circuit court. Then section 2024, Revised Statutes, 1879, (Acts 1877) provides that justices of the peace shall have jurisdiction concurrent with the circuit court, in all cases of misdemeanor.

The proviso copied from the acts of 1868, *supra*, refers to cases not arising under any ordinance, but to those cases arising outside of said city ordinances of which the recorder and justices of the peace have concurrent jurisdiction, by virtue of section 15, *supra*, acts 1860, 1861. The ordinance, however, under which this misdemeanor was prosecuted fixes the penalty at a fine of not less than \$10 nor more than

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§90. Then this was an offense solely against the city, punishable by her laws, cognizable alone before her recorder, and with which the penalty attached by the State, to similar offenses committed against the laws of the State, has nothing to do. The 26th section of the act, above quoted, so provides; and the law gives this recorder exclusive jurisdiction.

We must, therefore, reach the conclusion, that the court below did not err in refusing the instructions 3 and 4, asked by the appellant.

The judgment of the court below is affirmed. All concurring. NORTON and SHERWOOD, JJ., absent.

WILKERSON, *Appellant*, v. THOMPSON.

1. **Instructions: ASSUMING FACTS.** An instruction which assumes the truth of a controverted fact in issue, should not be given.
2. **Possession, Friendly, Adverse: BURDEN OF PROOF.** Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession, continued after the sale, will be deemed to be subordinate and friendly to the purchaser, and cannot be changed into an adverse holding so as to permit the running of the bar of the statute of limitations, until a knowledge of its adverse character is brought home to the purchaser, and the burden of showing such change and knowledge is on the party so claiming adverse possession.

Appeal from Putnam Circuit Court.—HON. JOHN W. HENRY,
Judge.

REVERSED.

A. W. Mullins for appellant.

C. A. Winslow for respondent.

Neither party having shown a paper or other legal

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title to the land, and the defendant being admitted to have the prior possession, the right is presumptively with him. Prior possession is evidence of the better right as against a party not showing title, or a right to the possession. *Crockett v. Morrison*, 11 Mo. 3; *Dale v. Faivre*, 43 Mo. 556; *Bledsoe v. Sims*, 53 Mo. 305; *Norfleet v. Russell*, 64 Mo. 176. The two instructions given for plaintiff, submitted the facts on which he relied in the most favorable light. Plaintiff seeks to recover on the strength of an estoppel *in pais*; such estoppel will not support ejectment. *Allen v. Sales*, 56 Mo. 28. The court properly declared the law on the question of limitation. The land being military bounty land, the limitation of two years applies. Forcible entry will not interrupt the statute of limitations. *Ferguson v. Bartholomew*, 67 Mo. 212.

RAY, J.—This is an action of ejectment for the northeast quarter of section 14, township 58, range 21, in Linn county, Missouri. Suit was commenced in the Linn circuit court on May 12, 1871. The petition is in the usual form. The answer a general denial. A change of venue was afterward awarded to the Putnam circuit court, where the cause was tried by a jury, resulting in a verdict for the defendant, and judgment accordingly, from which the plaintiff has appealed to this court.

On the trial neither plaintiff nor defendant offered any paper title to the land in controversy. The plaintiff, however, in support of the issues on his side, offered evidence tending to show, that, on the 19th of March, 1869, the defendant and his son, Silas F. Thompson, were living together in a cabin, situated on the land in controversy, and surrounded by a field or enclosure of some ten acres, or more, which the son claimed to own. A part of the inclosure seems to have been on the northwest quarter of said section, and the balance with the house on the land in controversy. The plaintiff's evidence further tended to show that the house was first built on the northwest quarter of

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said section, in 1864 and afterwards, in about 1865 or 1866, moved upon the northeast quarter, or the land in suit; that the defendant thought and claimed, that the house and improvements were situated on the northwest quarter, and some of the witnesses said that neither the defendant or his son Silas ever claimed to own, or possess the northeast quarter, until after this fuss or controversy sprang up. It appears that the wife of defendant died, about 1865, and that the son married about that time and brought his wife there, and that after that they both lived in and occupied the house, and worked upon and cultivated the farm together. It, also, appeared that when the house and inclosure were first built, the line between the northeast quarter and northwest quarter had not been run, and that when the line was afterwards run, it then appeared that the house was near the dividing line but on the northeast quarter with a part of the inclosure, and that the defendant claimed that the surveyor was running the line too far west on him.

On the part of the defendant the evidence tended to show, that the first improvement on the land in controversy was made by the defendant, James N. Thompson, in 1861; that the improvements consisted of a small house, a cabin, with fencing around it, and was claimed and occupied by the defendant; that some five or six acres were fenced in 1865, 1866 or 1867; that the old man built the fence; that he made the rails and has lived there most, if not all, the time since; that the old man first commenced on the land in 1861; that Silas, his son, was a boy and came with his father; that they settled on the northeast quarter first; that he built the house first on his land, and then moved it out; that the old man claimed to own and to be upon the northwest quarter and did not claim to own the northeast quarter; that the old man and Silas cultivated the field in 1869, and planted a crop in the spring of 1870; that Silas married some time about 1862 or 1863; that Silas lived sometimes at home, and sometimes at other places;

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that the old man kept house for himself, while Silas and his wife were not living with him, and continued to reside at the same place, while Silas and his wife were residing elsewhere; while Silas lived there his wife did the house work and Silas worked on the farm, etc.

The plaintiff was also sworn as a witness in his own behalf and testified as follows: "About the 19th of March, 1869, the day before the lease was made, I went to where this land was and saw Silas F. Thompson, and the defendant here, chopping close to this land, but on the northwest quarter. I asked Silas who the improvements on the northeast quarter belonged to and he said they belonged to him; I then asked him what he would take for the possession and improvements, and he said \$200, if I would let him move the cabin off; Silas then said he would see the old man; if he concluded to take the \$200, would come to town next day. Silas and I then agreed that I would consult Judge Brownlee, and that he should come to Linneus next day and I would tell him what I would do; Silas came to town next day, and when I saw him he asked me what I had concluded to do, and I told him that we could trade; I gave him my note for \$200, due the next Christmas, and he made the first lease; old man Thompson, the defendant, was present during all the talk Silas and I had down where they were chopping; he did not inform or intimate to me that he held or claimed either the possession or improvements; the only thing he said was to Silas, that he had better not trade; he heard all that passed between Silas and me about the matter there. After the note was due and I had paid it, Silas told me that the old man was setting up some claim. I did not know that the defendant made any claim to the possession or improvements. I had bought stock from the place several times, and always traded with Silas, and never heard any objection from the defendant. I never had any conversation with the defendant about it; he was not present when the note was executed or lease taken by Silas.

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The plaintiff next offered and read in evidence the following leases, to-wit:

"Know all men by these presents that I, Joel H. Wilkerson, have rented and leased to Silas F. Thompson, the northeast quarter of section fourteen (14), township fifty-eight (58), range twenty-one (21), from this date until the 25th day of December, 1870; said Thompson is to continue in the possession from this date, and is to pay rent at the rate of \$5 per annum, and to hold possession of said land to said Wilkerson, to preserve the timber on the land, to cut no timber nor take any off the land, and agrees to give up the possession to said Wilkerson at any time he may demand the same, during the said time herein described, reserving the part on which any crop may be growing until the end of the term and to give possession of all the land at the end of his time without notice. Signed this 21st day of April, 1870.

SILAS F. THOMPSON, [SEAL.]

"Know all men by these presents that I, Joel H. Wilkerson, have rented and leased to Silas Thompson the northeast quarter of section fourteen (14), in township fifty-eight (58), in range twenty-one (21), for the term of one year from the date of this lease; said Thompson is to have possession immediately, and is to pay rent for the use of the same at the rate of \$5 per annum; said Thompson agrees to hold possession of said land to said Wilkerson, to preserve the timber on the land, to cut no timber nor take any off the land, agrees to give up the possession to said Wilkerson at any time he may demand the same during the said time herein leased, reserving the part on which any crop may be growing until the end of the year, and to give full possession of all the land at the end of the year without notice. Signed this 20th of March, 1869.

SILAS F. THOMPSON."

By agreement between the undersigned the within

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lease is hereby extended for the term of thirty (30) days, March 21st, 1870.

J. H. WILKERSON,
SILAS F. THOMPSON.

The plaintiff also introduced A. D. Christy, who testified as follows, to-wit:

"Was present when the line between the northwest quarter and the northeast quarter, 14, 58, 21, was run, surveyed in 1866 or 1867; the defendant was present and said the corner between the two tracts of land was too far south. Wilkerson paid me \$200 on a note given by him to Silas F. Thompson; the note was paid about the 25th of December, 1869."

On cross-examination the said witness stated: "Three or four acres of the improvement by that survey were on the northeast quarter, 14, 58 21, and the house in which the Thompsons resided was on the northeast quarter, and part of three strings of fence enclosing in part the three or four acres."

The defendant was also sworn as a witness in his own behalf, and testified as follows, to-wit: "Know this land since 1860; took possession of both quarters in 1860. In 1869 I had ten acres improved. I built on the northeast quarter first in 1860; moved the house in July, 1866, further out on the same quarter; I remained on the land since I first built there; Wilkerson came to Silas and myself when we were at work. Wilkerson, Silas, what do you say to signing a lease to the land inside the field; said he would put \$5 in the lease, but did not care whether it was paid or not. I asked Wilkerson if he had the old patent on the land, and he said yes, and pulled out a paper which was bogus. I know a good title when I see it; President Monroe never signed that paper. I then said to Silas, 'keep your hands out of it, sir.' The improvements on the land were worth \$400 or \$500 when Silas traded with Wilkerson. I made the improvements on this land myself,

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and have held and occupied the same ever since for myself and for nobody else. I never received any part of the money that Wilkerson paid to Silas Thompson, and knew nothing about either the note or the lease, no party thereto. Silas did not sell the improvements with my consent. Silas moved off of the land in 1864, and was gone about two years, and came back with his family and lived with me. I lived on the place all the time and kept my stock and effects all the time, and live there now. I had eight or ten head of cattle most of the time, and about thirty head of hogs. Silas worked at making the improvements with me."

The plaintiff here admitted that the land sued for was military bounty land of the war of 1812, patented by the United States to the soldiers in 1819.

The defendant, also, offered his son, Silas F. Thompson, as a witness in his behalf, who testified as follows, to-wit: "My name is Silas F. Thompson, age is 32 years, my residence is Linn county, Mo.; I have been acquainted with the tract of land in controversy since 1864; I don't know when I first saw the place that any improvements were on it; the first improvements that I know of were made in 1866; the old man and I made the improvements; my mother died in the year 1864, in July or August; my father was living at that time in the bottom; I do not remember upon which quarter; the house was moved on this land by my father in the year 1866; it was a log cabin about 14 by 16; it was used for a dwelling by my father and myself; after it was moved it was rebuilt; after I moved there, my father has continued to live there on the same tract ever since from 1866 till 1870; I lived there in the spring of 1870; I moved to Eusly Ralph's place, about 100 yards from this place; I moved back in February, 1872; I think during my absence the old man resided upon this same tract; I remained there after moving back from Yellow Creek about one year; I went upon this quarter section in 1866; there have been a couple acres about the house and

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about the same number down the west line fenced in; while I was on Yellow Creek the old man cultivated the land about the house; I think there was no arrangements between my father and myself, except that he wanted me to come and live with him; the improvements which were made after I went there were made partly by myself and a young man by the name of Johnson, and the old man; I think the trade between Mr. Wilkerson and myself was made in March, 1869. I signed a lease at that time for the tract of land in controversy; I was in Linneus when I signed the lease; my father was at home when I signed the lease; my father was present at the conversation between Mr. Wilkerson and myself; Mr. Wilkerson wanted to rent the land but I would not lease it unless he would consent to give me \$200; he told me to come up and we would fix it up; the old man did not say much of anything; I think he did suggest that I had better not trade; I got Mr. Wilkerson's note for the \$200 which I traded for a piece of land; the note was made payable to me; my father never received any of the purchase money; he had nothing to do with making either the trade or the lease; Mr. Wilkerson agreed that at the end of the year I could take off the house; the trade mostly closed at his visit to me; he said he would see Brownlee, and if he would agree to the trade it would be all right; the old man was living from town at that time about two miles; I think Brownlee drew up the lease; I moved off the place about a year and one month after the lease was made; after I left the old man lived on the same quarter of land and has been living there ever since the new house was built, in March, 1872; I think it is 18 by 16, one story and a half high and is a frame; I think I hauled one or two loads of lumber from the mill for my father before I came back; the house is on the northeast quarter, about four rods from the east line, and may be a little over twenty rods from the north line."

Cross-examined: "When the trade was made between myself and Mr. Wilkerson, I was on southeast section 14,

close to this land ; it was not more than two days after that I came up to make the lease ; I started up to make the lease in the morning ; my father was at home at this time ; I do not remember whether he knew why I was going to town or not ; Mr. Wilkerson gave me his note for two hundred dollars ; it was due a Christmas day of the December following ; I retained possession of it until about due, and then traded it to A. D. Christy ; my father knew that I had the note ; he knew what it was given for ; Mr. Wilkerson gave me permission to remove the house and the rails ; my recollection was that I was to have the privilege of removing all the improvements ; I think the lease was renewed after it first expired, I believe for about one month, and at the expiration of that month I think I made a new lease from the end of that month, until the 25th of December or New Year ; I was not living on the land at the time of the second lease, though the old man and myself did put in a crop of corn in the spring 1870 ; I did not finish the cultivation of the crop because the old man objected to me working it ; there was no difficulty about it except that he did not want me to work there unless I would do as he said ; there was no difficulty between us about my having made the lease. My family was the first to occupy the house built on this land in 1866 ; I do not know of any other family having occupied it since I left it ; I did not help build the new house ; I only hauled two or three loads after I came back ; my father and myself were at work chopping some poles when Mr. Wilkerson come down to make the trade ; all the conversations that passed between Mr. Wilkerson and myself was while my father was present, and when I came up we had no other conversation, except Mr. Wilkerson said that he would do that ; and he made the note and I signed the lease ; I quit cultivating the crop in 1870, because I considered the locality unhealthy, having lost my little girl there, but part of the difficulty was that my father wanted me to let him have \$80 to put into a silver mine and I only let him have \$40 ; the old man did not ask

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me for a cent of the money I got for the land; I think my father wanted me to give him the \$80; he did not say whether he wanted it as a loan or as a gift; in 1869 and 1870, my father had no family; in 1869 I had a wife and two children; I did the general trading and management for the farm while my father and I lived together, and my wife had control of the household matters; we worked together and all we made was common to both, and all the provisions for the family were either obtained from the farm or by the sale of produce from the farm."

Re-examined: "When I was away I supposed the old man done his own trading; when I was living with him we worked together, and all was put in after I went there except about one acre around the house. The note given me was to secure the possession of the northeast quarter; I did not give possession at the time of the trade because I had no house to go into; I do not think I ever paid any rent; do not think Mr. Wilkerson ever asked me for any."

At the close of the testimony, the court gave the following instructions for the plaintiff, to which defendant excepted:

1. If the jury believe from the evidence that in the month of March, 1869, and prior thereto, one Silas F. Thompson was in the possession of the northeast quarter of section 14, township 58, range 21, in Linn county, Missouri, and that in the said month the said Silas sold to plaintiff the improvements and possession thereof, representing himself as the owner thereof, and that the plaintiff relying upon such representations, and having no means of knowing them to be false, paid the said Silas \$200 for said improvements and possession, and that the defendant, James N. Thompson, was present during the negotiations for said sale, and knew of the same, and did not disclose to the plaintiff at the time any claim to the land or the possession thereof, (and that the said Silas, during a part of the year 1869 and 1870, occupied said lands, or any part thereof

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under the leases which have been read in evidence) (Marked on margin "not asked")—the jury should find for the plaintiff.

2. If the jury believe from the evidence that in the month of March, 1869, and prior thereto, one Silas F. Thompson was in possession of the northeast quarter of section 14, township 58, range 21, in Linn county, Missouri, and that in the said month the said Silas sold to plaintiff the improvements and possession thereon, representing himself as the owner thereof, and that the plaintiff relying upon such representations, and having no means of knowing them to be false, paid the said Silas \$200 for said improvements and possessions, and that the defendant, James N. Thompson, was present during the negotiations for said sale and knew of the same, and heard offer to purchase and said Silas to sell same and did not disclose to the plaintiff at the time any claim to the land or the possession thereof, then the law precludes the said James N. Thompson from now setting up any claim or title to said lands or the possession thereof which he then had or now claims to have then had.

The court then gave the following instructions for the defendant, to which the plaintiff excepted.

6. Although the jury may believe from the evidence that Silas F. Thompson took the leases from plaintiff, which have been read in evidence, yet if they further believe that defendant was not a party to either of said leases, and that he remained in the actual possession of said premises from the time of the sale from Silas to Wilkerson, claiming the premises as his own, then the fact that Silas F. Thompson took the leases from Wilkerson, did not stop or prevent the statute of limitation running in favor of defendant.

7. Although the jury may believe from the evidence that Silas F. Thompson sold plaintiff, with the consent of the defendant, the possession and improvements of and on the premises here sued for, on or about the 20th day of March, 1869, yet if they further believe from the evidence

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that defendant, from and after that date, continued in the actual, open, notorious and continued possession of said premises for two years or more, before the 12th day of May, 1871, claiming the same as his own, and adversely to the plaintiff, they are bound to find for defendant.

The court then also gave the following instructions for the plaintiff: "If the jury believe from the evidence that Silas F. Thompson was in the possession of the land sued for under the lease read in evidence, within two years before the 12th day of May, 1871, then plaintiff's right of action is not barred by the statute of limitation, as set forth in the instructions for defendant."

To the giving of which defendant at the time excepted.

Under these instructions, the jury, as before stated, found a verdict for defendant, and there was judgment accordingly, from which the plaintiff has appealed to this court, and now insists that the trial court erred in giving for the defendant, the foregoing instructions No. 6. and 7. Among other objections, appellant insists: 1st, That each of said instructions, by necessary implication, assumes that defendant, at and before the date of the sale and lease, in question, was in the actual possession of said premises; which, it is contended, was one of the controverted facts, that should have been submitted, and left to the jury for their determination. 2d, That, under the evidence in this cause, the remaining or continuing in possession, under claim of title, by defendant thereafter, for the statutory period in question without more, was not sufficient to confer title by limitation, unless it also appeared that a knowledge of that fact was in some way brought home to the plaintiff, and that thereafter and prior to the institution of this suit he so remained or continued for the statutory period in question, and that said instructions should have so told the jury.

Under the authorities these objections we think, are well taken. It has repeatedly been so held by this court; and the adjudications elsewhere, as well as text writers, are

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to the same effect. *Peck v. Ritchey*, 66 Mo. 114; *Wash. Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Merritt et al. v. Given et al.*, 34 Mo. 98; *Thompson v. Botts*, 8 Mo. 710; *Hamilton v. Boggess*, 63 Mo. 234; *Tyler on Eject. & Adv. Poss.*, 876; *Skinner v. Stouse*, 4 Mo. 93; *Rice v. Bunce*, 49 Mo. 231; *Tyler on Eject. & Adv. Poss.*, pp. 74, 166, 836, 874, 877.

The theory of defendant's instructions concedes the correctness of the instructions given for the plaintiff, but attempts to escape their force and effect by claiming that, while the defendant may be estopped from setting up the possession and ownership he may have had at and prior to said sale and lease, yet that it is competent for him, under the statute of limitation, to set up and rely upon a possession and ownership acquired or obtained, subsequent to that date, and held by him adversely under claim of title, for the statutory period in question, after such acquisition and prior to the institution of this suit. This it is conceded he may do. But, it is denied that defendant's instructions above given, properly construed, contemplate or submit that question to the jury. On the other hand, the jury, in effect, are told by these instructions that the remaining or continuing in possession, by defendant, under claim of title, for the statutory period, from and after said sale and lease, was of itself sufficient to defeat the plaintiff's recovery, although the jury might believe the facts, predicated in the instructions given for the plaintiff.

This, we think, was not a correct presentation of the law, applicable to the facts of this case, as disclosed by the record. For such purpose there is a material and manifest distinction, between the acquisition of an original or new possession, after the date of said sale and lease, and the simple continuance of an old possession, that may have existed prior thereto. Under the facts predicated in plaintiff's instructions, the possession and ownership of the premises, at and prior to said sale and lease, as against this defendant, were indisputably with Silas Thompson, the son of defend-

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ant, and that possession and ownership as against this defendant, by operation of law, was indisputably transferred to the plaintiff, *eo instanti*, by the making of the sale and lease in question. Whatever possession or ownership, if any, the defendant may have had, at and prior thereto, or may have remained or continued with him thereafter, under the facts of this case, was in legal contemplation, subordinate and not hostile to the possession and ownership so acquired and held by plaintiff, and could not, under the statute of limitation, be successfully converted into an adverse holding, until a knowledge of this change from a friendly to adverse holding, was, in some way, brought home to the plaintiff, and continued thereafter for the requisite statutory period; and the burden of showing such change and knowledge rests on the defendant. Such, we think, is the well settled law in such cases. To this effect are the authorities cited, *supra*.

These views are altogether ignored in defendant's said instructions, and in these particulars they are erroneous and misleading. For these reasons, the judgment of the trial court is reversed and the cause remanded for further trial. All concur, except HOUGH, C. J., absent.

THE CITY OF HANNIBAL V. RICHARDS, *Appellant*.

1. **Municipal Corporation : NUISANCE, ABATEMENT OF.** A city cannot create a nuisance upon the property of a citizen and compel him to abate it.
2. ——— : **CHARTER : PLEADING : ISSUE.** The charter of a city, authorizing it to fill a lot on default made by the owner, gives it a demand against him for the cost of filling the lot, if done by the city, and the averment of the cost of the work is one upon which an issue may be made.

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Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

REVERSED.

Thomas H. Bacon for appellant.

The section of the charter authorizing this proceeding must be strictly construed. *Cooley on Tax.*, p. 209, note 1; *Wood on Nuis.*, 770, § 738. And as the claim involved under this section was created by a summary proceeding on the part of respondent, the strictest proof will be required to make out a cause of action. *Weimer v. Bunbury*, 30 Mich. 201; *Kansas v. Campbell*, 62 Mo. 585. Where the alleged grievance is a requirement of the public health, the grievance must amount to a public nuisance before the delegated power, either of local assessment or of police regulation can be applicable. There must be an injury to the public health. *Wood on Nuis.*, 771, § 739. There could be no public necessity to fill or drain defendant's lots unless in their condition they constituted a public nuisance. The charter does not condition the municipal power on the maintenance of a public nuisance, and so far the charter is in violation of the constitution. The charter founds the proposed cause of action absolutely on the mere opinion of the city, and this is likewise beyond the legislative power. *River, etc., v. Behr*, 77 Mo. 91, p. 98. The ordinance did not allege a nuisance, neither did it allege that the public health required the filling of the lots. The petition did not allege a nuisance, neither did it allege that the public health required the filling of the lots. There was no proof of a nuisance, and no proof as to the requirements of the public health. The court erred in excluding the plat of the city showing the riparian character of appellant's lots. The court erred in excluding appellant's title deed, as it showed that he was owner of the lots at the time of the city's wrongful obstruction of the channel, and that appel-

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lant had done nothing to contribute to the condition complained of. The court erred in excluding appellant's evidence showing that whatever unhealthy conditions existed were wrongfully created by the city itself against and over the protest of appellant at the time. The court erred in excluding appellant's evidence, showing that the supposed unhealthy condition could have been removed by drainage at an expense of \$75. *River, etc., v. Behr*, 77 Mo. 92. The general assembly did not undertake to make the city's mode conclusive. The city ordinance was subject to judicial review. *Corrigan v. Gage*, 68 Mo. 541. The court erred in excluding evidence to prove that the filling was only done on the rear end of the lots, and on an undescribed fraction thereof. The city could not charge any land but that which it filled, and the identity of the filled land was material. The court erred in excluding appellant's evidence as to the cost of filling. An allegation was that defendant was indebted. This was denied and was sufficient. *Westlake v. Moore*, 19 Mo. 556. The court erred in excluding appellant's evidence that the public health was not injured by said lots. *State v. Addington*, 77 Mo. 110; *River, etc., v. Behr*, 77 Mo. 91. The exclusion of all defendant's testimony subjects the case to review without a motion for new trial. *Coots v. Morgan*, 24 Mo. 522; The offers to prove have the same effect as if the proof had been made. 68 Mo. 544. The court erred in overruling the motion for new trial, and the motion in arrest wherein all above considerations were specially renewed. The court erred in excluding the evidence that the city itself created and wrongfully created the condition complained of. *Weeks v. Milwaukee*, 10 Wis. 258; Cooley on Const. Lim., 512; *Corrigan v. Gage*, 68 Mo. 541; *Cape Girardeau v. Riley*, 72 Mo. 220, p. 214, top; *St. Louis v. Richardson*, 76 Mo. 470, p. 484; *Barring v. Com.*, 2 Duvall (Ky.) 95.

Easley, Eby & Russell for respondent.

The ordinance of the city council made in pursuance

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of Sess. Acts, 1873, p. 253, § 14, is conclusive of the question of whether the health of the city required the filling of the lots. The presumption is that whatever was done was rightfully done, and may be held as *prima facie* evidence, that the health of the city required the filling of the lots. *Salem v. Railway Co.*, 98 Mass. 457. A judicial determination that the lots in question were nuisances, and injurious to public health, was not required before the city could act in abating such nuisances and protecting the public health. The city charter expressly confides that power to the city, and it had exercised it in this case by declaring the lots in question nuisances, and ordering that they be filled up. Sess. Acts, 1873, pp. 242, 243, §§ 19, 20; p. 253, § 14; *Kiley v. City of Kansas*, 69 Mo. 109. The appellant had the right to show that the health of the city did not require the filling of the lots. *City of St. Louis v. Schnuckelberg*, 7 Mo. App. 536. This the appellant did not attempt to do. He only proposed to prove "that no person's health was ever injured by said condition of defendant's lot." If the action was by a private person for damages arising from the nuisance, special injury would have to be shown. Wood on Nuis., p. 655, § 618. But the whole machinery of the police power over matters affecting the health of communities is designed to prevent injury, and not to furnish redress for injuries sustained. Wood on Nuis., p. 72, § 70. The charter of the city gives both a general (Acts 1873, p. 243, § 20) authority to cause nuisances to be abated at the expense of the owners of the ground; and a special authority over the filling up of lots when the health of the city requires it. This special provision, "in view of the end for which it is given is not subjected to a hostile or even a narrow construction." 1 Dillon Munic. Corp. (3d Ed.), p. 384, § 379; *Kiley v. City of Kansas*, 69 Mo. 107. Both the general and special provision are proper exercises of the police power of the state. Cooley's Const. Lim. (5th Ed.) 741. That no provision is made for compensation to the lot-owner, does not render the proceedings in-

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valid. 1 Dillon Munic Corp. (3d Ed.) p. 166, § 141, note. The deed and plat offered in evidence were properly excluded. There was no issue made as to the ownership of the property. The court properly excluded the evidence proposed to be offered as to the value of the amount of work done. The city had, in good faith, expended the amount sued for, and is entitled to recover it. 1 Dillon Munic. Corp. (2d Ed.) p. 213, § 96. The allegation of the petition was that the "cost of filling" said lots were the amounts named. This the answer did not deny. The answer simply asserted that the appellant was not indebted, etc. This was not a denial of the alleged cost of filling the lots.

HENRY, J.—This is an action by which plaintiff seeks to recover of defendant the cost and expense of filling two lots owned by him in the city of Hannibal. The work was done by the city on the refusal of defendant to comply with an ordinance, ordering the owners of certain lots to fill them, the health of the city requiring it in the opinion of the city council, as expressed in the preamble to the ordinance. By the city charter whenever, in the opinion of the city council, the health of the city requires it, said council is authorized to order any lot to be filled by the owner thereof. The lots owned by defendant were lot No. 2 and the north third of lot No. 1 in block No. 14. On a trial of the cause plaintiff had judgment from which defendant has appealed.

The evidence for plaintiff tended to prove the cause of action alleged in the petition, and defendant then offered to prove by witnesses present in court, that Bear Creek had been from time immemorial a natural running stream about fifteen miles in length, with a width as shown on the plat in evidence, with defined and actual banks, with a volume of water sufficient for navigable purposes for a short distance at certain seasons of the year. That in 1849 and 1850 the plaintiff wrongfully cut a new channel across the

neck of the bend shown in said plat so as to run straight to the river, leaving out from said channel the part of Bear Creek on defendant's property, all wrongfully done by said plaintiff without warrant of law; that in 1859, subsequent to defendant's said purchase, the plaintiff constructed its embankment on Second street, as shown in said plat, said embankment being about fifteen feet high running across said bend of Bear Creek so as to cross said creek twice, cutting off defendant's lots and cutting off the channel of said creek therefrom, and damming the water on said lots of defendant without leaving any drain for the water to escape from that part of said creek on defendant's land, and that defendant protested to the city authorities at the time against said action; that after such embankment was made the defendant requested plaintiff to open a passage way for the drainage of said stream from his lots, but the plaintiff then and ever since has neglected to put in any such drain; that the part of said creek bed thus cut off was the drainage basin of a large adjacent area, thus wrongfully converted into a pond by said plaintiff without authority of law; that at the time the plaintiff passed its ordinance the said pond could have been drained by opening culverts through said old channel across said Second street at an expense not exceeding \$75, and that the drainage of said old channel was thus entirely practicable at light expense, and would have been entirely effectual in relieving said lots, and that there never would have been any objection to defendant's lots as a nuisance but for the said action of the plaintiff; that whatever alleged nuisance was on said lots was created by the direct and wrongful action of the plaintiff only; that the work so done by defendant [plaintiff?] did not abate said alleged nuisance or improve the health of said city, but continued to leave said lots subject to overflow; that the filling up of said lots was entirely unnecessary and inadvisable, and was done contrary to the will of defendant; that at the time the said alleged ordinance was

passed, the said creek channel had become changed by a wash on the outer curve to the rear end of said lots.

Further, the defendant offered to prove by said witnesses that the work actually done on defendant's lots did not amount to more than nine hundred and fifty-four 82-100 cubic yards, and that the reasonable value of doing such work at this time was not over twenty-five cents per cubic yard; that the plaintiff's actual cost of the work at the time was not three-fourths of the amount charged in the petition, and that the city unnecessarily and wrongfully aggravated its cost of doing such work, that no person's health was ever injured by said condition of defendant's lot; that the alleged cost of filling said lots was greater than the value of the property so filled; that the fill made was not on the whole of the parcels described in the petition, but only on the rear end thereof and on the undescribed fraction thereof.

To the introduction of this evidence the court sustained plaintiff's objection and thereupon gave such instructions as authorized a verdict for plaintiff. Considering as proved, the facts which defendant offered to prove, the construction of the embankment on Second street by the city was subsequent to defendant's purchase of the lots and that embankment prevented the flow of the water from the lots and occasioned its accumulation upon them, which, it is alleged injuriously affected the health of the city. It has been repeatedly held by this court, that the owners of the lots under such circumstances could not maintain an action against the city for the damage to them but that such injury is *damnum absque injuria*. Now, we are asked to hold, also, that the city may create a nuisance upon the lot of an individual and then have it abated at his expense, if he refuse to do it when ordered. As well at once declare that no one can acquire any rights to town or city lots which the municipal corporation is bound to respect. The city cannot create a nuisance upon the property of a citizen and compel him to abate it. *Weeks v. City of Milwaukee*, 10

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Wis. 269. The cost of filling the lots was the extent of defendant's liability, if any existed, and we see no reason why defendant should not have been permitted to show that it was less than plaintiff claimed. There is no law declaring municipal corporations infallible or that their demands are incontestible. The charter authorizing the city to fill a lot, on default made by the owner, gives her a demand against him for the cost of filling it, if done by the city, and the averment of the amount and cost of the work is one upon which an issue may be made. At a trifling expense at the time plaintiff passed the ordinance requiring these lots to be filled the pond could have been drained and but for the neglect of the plaintiff to make such drain the nuisance complained of would never have existed. The judgment is reversed and the cause remanded. All concur.

GREEN V. ESTES, *Appellant*.

Statute of Frauds: PROMISE TO DEBTOR TO PAY HIS DEBT. A promise made to a debtor of a third person to pay the debt for him, if founded on a new and valid consideration, is not within the statute of frauds, and the creditor can sue the promisor directly on the agreement; but it is otherwise if the promise is made to the creditor himself.

Appeal from Louisiana Court of Common Pleas.—HON.
ELIJAH ROBINSON, Judge.

AFFIRMED.

Morrow & Gray for appellant.

Even if otherwise correct, the facts of this case did not warrant the instruction given for plaintiff. *Glenn v. Lehman*, 54 Mo. 45. The instruction is erroneous under any state of facts, and virtually annuls the statute of frauds;

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for, an unscrupulous creditor and his debtor, can avail themselves of such an interpretation of the statute as to render it wholly inoperative as a defense to the one whom they seek to victimize. Waite's Actions and Defenses in Law and Eq., vol. 7, pp. 16, 17, 18. There was no sufficient consideration by way of advantage to Fry or Estes, or of detriment to Green, to support a promise on the part of Estes to pay Fry's debt. The first instruction asked for the plaintiff, should have been given. *Jackson v. Ragnor*, 12 Johns. 291; *Simpson v. Patton*, 4 Johns. 422; *Watson v. Randall*, 20 Wendell 201. The of statute of frauds authorized instruction second asked for by defendant. R. S. 1879, sec. 2513; *Deegan v. Conzelman*, 31 Mo. 424. Independent of the statute of frauds, the third instruction asked for by defendant was a proper exposition of plaintiff's own theory of the case and should have been given. *Cook v. Elliot*, 34 Mo. 586; *Musick v. Musick*, 7 Mo. 495; *Bissing v. Britton*, 59 Mo. 204.

D. A. Ball for respondent.

The promise was not within the statute of frauds. *Edgell v. Tucker*, 40 Mo. 523; *Malloy v. Gillet*, 21 N. Y. 412; *Brown v. Weber*, 38 N. Y. 187.

EWING, C.—This was a suit originally before a justice of the peace on an account as follows:

	1879, July 26th.
To amount of Wm. Fry's account assumed by him...	\$33.00
Contra.	
July 26th, by cash of Field Estes.....	15.00
Balance due by Estes.....	\$18.00

Verdict and judgment for defendant before the justice; an appeal to the Louisiana court of common pleas where there was judgment for plaintiff, and the defendant appeals to this court.

The evidence on the part of the plaintiff, was to the effect that one William Fry owed him on store account \$33; that in July, 1879, after the debt had been contracted and was past due, said Fry and defendant, Estes, came into his store, when Estes then paid him \$15 on the Fry account and assumed the balance of \$18, and plaintiff released Fry. The evidence also tended to show that afterwards, in a settlement between defendant and Jacob Fry, the father of Wm. Fry, he (defendant) kept out the amount due Wm. Fry to plaintiff. Fry was not indebted to Estes on any account, nor was Estes indebted to him on any account. The evidence on the part of defendant, was to the effect that he did not pay any part of William Fry's debt to plaintiff, and that he at no time agreed to pay said debt or any part thereof—and never assumed to pay it or any part of it—nor was Fry indebted to him, nor he to Fry.

The case was then submitted to the jury upon the following instructions given by the court at the instance of the plaintiff:

"The court instructs the jury that the burden of proof in this case rests upon the plaintiff, and before plaintiff can recover it devolves on him to prove to the reasonable satisfaction of the jury, that on or about this 26th day of July, 1879, William Fry was indebted to plaintiff, and that it was then agreed by and between plaintiff and defendant and said William Fry, that defendant would assume and pay the debt due from Fry to plaintiff, and that plaintiff would release Fry from his obligation to pay said debt, and that plaintiff did then and there in consideration of defendant's agreement to pay said debt release said Fry."

"If these facts have been proven to the reasonable satisfaction of the jury by the evidence in the case, then the verdict will be for the plaintiff for the amount assumed by defendant with interest thereon at the rate of six per cent. per annum from the 20th day of August, 1881, or from date plaintiff demanded payment of defendant, if such demand was made. If the testimony in the case fails to

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satisfy the jury of the facts above mentioned, then they will find for defendant."

Defendant then asked the following instructions which were refused:

1. The court instructs the jury that plaintiff, under the evidence in the case is not entitled to recover, and the verdict should be for defendant.

2. If the jury believe from the evidence in the case that the debt sued on was contracted with the plaintiff, Duff. Green by one Wm. Fry, and that Wm. Fry was not indebted to defendant, nor the defendant to him, on any account whatever, then the plaintiff cannot recover in this action, unless it is shown by the proof in the case that the defendant by a written agreement signed by him, or some memorandum or note in writing signed by him or by his authority, promised or agreed with plaintiff to pay the debt owing to him by said William Fry.

3. Although the jury may believe from the evidence in the case that defendant verbally agreed and promised to pay the debt due the plaintiff by William Fry, yet the plaintiff cannot recover unless it is shown by the proof in the case that a valuable consideration for said verbal promise was paid to the defendant either by plaintiff or William Fry, as an inducement thereto, or in consideration thereof.

The evidence tends to prove that the promise of defendant, Estes, to pay to plaintiff the debt of Wm. Fry, was made to Fry, the debtor, and it, also, tends to prove a consideration for such promise. The evidence is conflicting but there was evidence tending to prove the promise and the consideration. In *Brown v. Brown*, 47 Mo. 130 it is held: "An agreement to pay and discharge the debt, made with the debtor or some person interested for him, if founded upon a new and valid consideration, is an independent undertaking and does not come within the letter or object of the statute." In *Howard v. Coshaw*, 33 Mo. 118, it is held: "It is well settled that a promise to a debtor to pay his debt to a third person is not a promise to

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answer for the debt of another within the statute; that the statute only applies to promises made to the creditor." *Eastwood v. Kenyon*, 11 Ad. & El. 433; *Westfall v. Parsons*, 16 Barb. 645; *Barker v. Bucklin*, 2 Denio 45; *Pratt v. Humphrey*, 22 Conn. 317; *Alger v. Scoville*, 1 Gray 391.

It follows that the court below did not err in giving and refusing instructions and the judgment is accordingly affirmed. All concur.

COMER V. TAYLOR, *Plaintiff in Error*.

1. **Seduction under Promise of Marriage: PARTY.** The injured woman alone can maintain an action for seduction, accomplished under a breach of promise of marriage.
2. **Seduction: ACTION BY PARENT FOR LOSS OF SERVICE: EVIDENCE.** Proof of promise of marriage is not permissible in an action by a parent for the loss of service of his daughter caused by her seduction.
3. ——— : ——— : ———. There can be no recovery by the parent in such action, unless the defendant is the father of the child.
4. **Damages: SEDUCTION: MEDICAL ATTENDANCE.** In such action the parent will be entitled to recover for medicine and medical attendance, if reasonable, whether he has paid the sum due therefor or not.
5. ——— . ——— : MISCONDUCT OF THE WOMAN. Where the carnal intercourse is occasioned as much by the misconduct of the woman as that of the man, there can be no exemplary damages.
6. **Instructions.** Instructions should not assume the truth or controverted facts.
7. **Seduction: DAMAGES.** No recovery can be had for the wounded feelings of plaintiff's family in an action for seduction of his daughter, based on the loss of her service

Error to Morgan Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED

A. W. Anthony for plaintiff in error.

Defendant's refused instruction numbered 2 should have been given. *Roberts v. Connelly*, 14 Ala. 239; *Boyd v. Bird*, 8 Blackf. (Ind.) 113; *Hill v. Wilson*, 8 *Ibid* 123. The court also erred in refusing defendant's instruction, to the effect that if plaintiff's daughter was over eighteen years at the time of the alleged seduction, he was not entitled to recover, unless the relation of master and servant existed between them. *Nicholson v. Striker*, 10 Johns. 115; *Bartley v. Richtmyer*, 4 Com. 78. She was of full age at 18. *Caho v. Endress*, 68 Mo. 224. The court also erred in refusing defendant's instruction numbered 7, which told the jury that if plaintiff knew that the course and conduct of his daughter would terminate in illicit intercourse, and that such conduct was allowed by him with no attempt at restraint, they should find for defendant. *Reddie v. Scoett*, 1 Peake 316; *Seager v. Sligerland*, 2 Caine's Rep. 219; *Smith v. Mastin*, 15 Wend. 270; *Fletcher v. Randa*, Anth. N. P. 267. The instruction asked by defendant that unless they believed the defendant was the father of the child, as alleged in the petition, the jury should find for defendant should have been given. *Eager v. Greenwood*, 1 Exch. 61. Instruction numbered 11, limiting the damages to those proved to have been actually sustained should have been given. So, also, numbers 12 and 13, limiting the amount of damages for medical attention to the sum actually paid. *Dixon v. Bell*, 1 Stark. N. P. C. 289. The instructions given for plaintiff are vicious, in that they make no distinction between carnal knowledge and seduction; a party is liable to the master for debauching his servant, thereby incapacitating her for service, to the amount of damages actually sustained, but punitive damages are only given in cases of seduction, and then not unless the seduction is clearly proved, and the daughter is shown to be a confiding victim to the wiles of the seducer. *Volenti*

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non fit injuna. The court committed error in excluding the question asked Sarah Comer, whether her older sister had not an illegitimate child seven or eight years of age. *Flint v. Clarke*, 13 Conn. 361. The plaintiff in aggravation of damages may show that he has other children, their general good conduct and how they may be affected by the injury to the seducer. 3 Esp. Rep. 120; and surely the contrary may be shown by defendant in mitigation of damages.

Storer & Neilson for defendant in error.

The two instructions given for plaintiff correctly presented the law and taken in connection with defendant's number 3, put the issues and law fairly and plainly to the jury. Most of the instructions asked by defendant and refused, particularly numbers 2 and 7 were without evidence upon which to base them, and were for that reason rightly refused. *Utley v. Tolfree*, 77 Mo. 307; *Price v. Railroad Co.*, 77 Mo. 508. These instructions were also inconsistent with the defense made by the answer. *Nugent v. Curran*, 77 Mo. 323.

PHILIPS, C.—This is an action for seduction by Jesse Comer, the father of Sarah Comer, against the defendant, Thomas B. Taylor. The petition contains the form of three counts. The first count of the petition states, in substance, that about the 15th day of February, 1877, defendant debauched and carnally knew Sarah Comer, the daughter of plaintiff, whereby she became pregnant and sick with child and so remained and continued for the space of nine months, and that at the expiration of said time, to-wit: December 6th, 1877, she was delivered of the child, and in consequence thereof she was unable to do the work of plaintiff. That he paid out large sums of money in and about the nursing and taking care of Sarah and the child, to the damage of plaintiff in the sum of \$1,000.

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The second count is similar to the first, with the additional averment, that plaintiff's daughter, under and by reason of a promise of marriage, was, by the defendant seduced, debauched, etc.; that in consequence thereof plaintiff lost her services; and was compelled to and did pay out divers sums of money in and about the delivery of the child, amounting in the aggregate to the sum of \$500, for which plaintiff asks judgment.

The petition then concludes as follows: "Plaintiff further states that by reason of the several premises aforesaid, he has been brought into public scandal, infamy and disgrace amongst his neighbors, etc., and has been greatly wounded in mind and feelings, and has suffered great anxiety and pain of mind, and has otherwise suffered and been greatly injured to his damage \$1,000, for which plaintiff also asks judgment against defendant. Wherefore, plaintiff states that by reason of all the several premises aforesaid he has been damaged in the total sum of \$2,500, for which he asks judgment against the said defendant, together with costs."

The answer tendered the general issue. The plaintiff recovered judgment for \$1,216. From said judgment defendant prosecutes this writ of error. Plaintiff's evidence tended to establish the issues on his part, while the defendant's evidence tended to show that the act of intercourse was without seduction and that he was not the father of the child born to said Sarah. Plaintiff's evidence, also, showed that Sarah was 26 years old at the time of the alleged seduction living with her father.

I. There was no occasion for employing three counts in this petition. The plaintiff has but one cause of action, and the petition should contain a plain statement of the facts expressed in one count. The second count would seem to be predicated of a seduction accomplished under a breach of promise of marriage. For such breach of contract the woman alone could maintain action. In the action by the father, based on the loss of service, proof of the

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marriage contract is not permissible. The furthest the courts have permitted the inquiry to go, is to ask if the defendant paid his addresses in an honorable way. Sedgw. on Dam. 517 (7 ed.); *Foster v. Scofield*, 1 J. R. 297; *Clark v. Fitch*, 2 Wend. 464; *Gill v. Mead*, 7 Wend. 193. Proof of the marriage contract was given at the trial by plaintiff, but without objection from defendant.

II. The court erred in refusing the 10th instruction asked by defendant to the effect that, unless the jury believe from the evidence that the defendant is the father of the child they should find for the defendant. In a case, especially like this, where the daughter is over age and the plaintiff cannot legally demand her services, the very foundation of his action is that the relation of master and servant subsisted in fact between him and his daughter at the time of the seduction and consequent loss of service, and expense thereby incurred. *Millar v. Thompson*, 1 Wend. 447; *Vossell v. Cole*, 10 Mo. 635; *Roberts v. Connelly*, 14 Ala. 235. The logical result of this postulate must be that unless the pregnancy and confinement which occasion the loss, follow the act of intercourse between defendant and the daughter, the father cannot maintain this action. As Alderson, B., in *Eager v. Grimwood*, 1 Exch. Leg. Ob. 34, p. 360 says: "It is clear that the parent cannot maintain this action where the daughter is in the service of another person which shows that the action is founded on the loss of service. Now if the mere fact of connection is to be held a loss of service it is difficult to see where it would end. Suppose a servant took a walk contrary to the orders of her master would that be a loss of service?" This is the recognized law. 2 Greenl. Ev. (14 Ed.) par. 577; *Knight v. Wilcox*, 14 N. Y. 413. There was evidence before the jury to warrant the giving this instruction, for the defendant testified that he did not have intercourse with the woman within ten months of her accouchment.

III. The court gave an instruction at the instance of plaintiff, authorizing the jury to allow plaintiff for medic-

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inal attention and medicines given his daughter and refused one asked by defendant to the effect that plaintiff could only recover the amount actually paid out by him for such purpose. If, as matter of fact, the plaintiff incurred liability for medicines and medical attendance he would be entitled in this action to recover the same, if reasonable, from the defendant, whether he had or had not paid the amount. Being bound therefor he is entitled to recover the same from the responsible agent occasioning the expenditure. *Leisse v. St. L. & I. M. R. R. Co.*, 2 Mo. App. 105; *Klein v. Thompson*, 19 O. St. 569; *Gries v. Zeck*, 24 O. St. 329; *Forbes v. Loftin*, 50 Ala. 396; 1 Sedg. on Dam. 39. There is no evidence, however, preserved in the bill of exceptions to show that any such services were rendered in this case at the instance and request of plaintiff, or that he had expended a cent.

IV. The defendant asked and the court refused the following instruction:

2. The court instructs the jury that sexual intercourse may take place without seduction, where both parties desire it, and the impulse is mutual, and if in this case the jury believe from the evidence that both parties desired it, and the impulse was mutual, then the plaintiff cannot recover exemplary damages.

We are of the opinion that the court erred in refusing this instruction. The prime basis of this action being the loss of the service of the daughter, her incontinence and guilty conduct in inducing the cohabitation would not wholly defeat the action. The loss of her service and the expense and trouble attending her confinement would be the same to the father, as if she were chaste and had been actually debauched. In such case the amount of his recovery would be limited to such loss. *Akerley v. Haines*, 2 Caines 291. On the other hand, it is as equally well settled that criminal connection may take place without seduction, and if the seduction be not satisfactorily proven no damage for it can be recovered. 2 Sedg. on Dam. (7 Ed.) p. 515.

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IN *Hill v. Wilson*, 8 Blackf. 123, Blackford, J., says: "Supposing the daughter to have been unchaste, and the alleged carnal intercourse to have been occasioned as much by her misconduct as by that of the defendant, the latter would not then have been guilty of seduction. That would be a case of criminal connection without seduction, and one in which, though the suit for loss of service could be sustained, the damages would not be aggravated on the ground of seduction." Not only did the evidence of the defendant tend directly to show that the woman was unchaste and as willing as the defendant, but the attending circumstances, the time and place, and manner of cohabitation and its long continuance were such as might satisfy a reasonably apprehensive jury that "the carnal intercourse was occasioned as much by her misconduct as by that of the defendant." In such cases the maxim *volenti non fit injuria*, is a fit expression of the law. *Robinson v. Musser*, 78 Mo. 153.

V. The second instruction given on behalf of plaintiff is as follows: "The jury are instructed that if they should find for the plaintiff they shall assess his damages at any sum not exceeding \$2,500. And in determining the amount of damages the jury may take into consideration the deep anxiety and mental pain suffered by plaintiff and the loss of the society and comfort of his said daughter, also the injury done to the feelings, affections and wounded pride of himself and family, and the condition in which the daughter of plaintiff was left by reason of said seduction; and they may, also, take into consideration the injury done to the character and good name of plaintiff's daughter and servant, and the loss of marriage and consequent disgrace, and for being brought into public scandal, notoriety and shame by means of said seduction by defendant." This instruction is pregnant with vice. It is too comprehensive. It assumes, all the way, facts disputed and in issue. It assumes that plaintiff had deep anxiety and affections, that he had suffered mental pain and wounded pride, that the daughter had good character

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which was brought into disgrace and scandal, and that the defendant did seduce her. These were all facts disputed by the general denial and were to be found by the jury from the evidence. Nor are we aware of any authority in this character of action to warrant that part of the instruction directing the jury to allow the father damages based on the future condition of the daughter and child, or for her loss of marriage and consequent disgrace, etc.

VI. When Sarah Comer was on the witness stand the defendant, on cross-examination, asked her if an elder sister of hers had an illegitimate child some seven or eight years ago? The court refused to allow this question. This is assigned for error by defendant. It does not appear from the bill of exceptions whether this sister was a member of plaintiff's family or household at the time of her misfortune, or whether she had since resided in it, or any of the attending circumstances of the imputed misconduct. Under such state of the record we are unable to say that any error was committed by the court in rejecting the question. It would be a harsh rule to establish that because forsooth a daughter, years before had brought shame and reproach upon a father's home, it could no longer be the abode of virtue, nor under the law's protection against the lecher and seducer, or that the father, who had not connived at either misstep, might not feel as keenly the pangs of reproach and dishonor upon himself and family for the second as for the first invasion and prostitution of his household. It should not escape remark, however, in this connection that, after objecting to this evidence, the plaintiff in said second instruction told the jury that in estimating the measure of plaintiff's damages they might take into the account the "wounded pride of plaintiff's family." It must hold good as a principle of equity and equality that if the plaintiff may have the character and wounded feelings of his family thrown into the scales in augmenting his damages, the quality of their character and sensibilities would be a legitimate subject of inquiry and investigation. If the family or

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any member of it is wanting in chastity or moral sensibility the jury ought to know it, and its extent before estimating how much damage they will allow on account of the "wounded pride" of the whole family. If the plaintiff would not open up such inquiry he should omit it from his instructions. The family are not parties to the suit. No recovery can be had for their wounded feelings in this action. The jury in estimating the measure of plaintiff's damages, may take into consideration his anguish, etc., on account of the loss of the society and comfort of his child and the dishonor which he feels is brought upon himself and his home. 2 Sedg. on Dam. (7 Ed.) p. 516, note b; Opinion of Lord Ellenborough in *Southwood v. Ramsden*, Middx. Sitting, K. T., 1805; *Morgan v. Ross*, 74 Mo. 322, 323.

The judgment of the circuit court is reversed and the cause remanded. All concur.

THE CITY OF ST. LOUIS v. THE ST. LOUIS GASLIGHT COMPANY,
Appellant.

Injunction: BOND: DAMAGES. An assessment of damages for defendant upon the dissolution of an injunction, cannot be made except as incident to a bond or stipulation given by plaintiff to pay the damages consequent upon such dissolution.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Glover & Shepley and Noble & Orrick for appellant.

1. The assessment of damages must, in all cases where the injunction is dissolved on final hearing, follow the decree; and this, whether the injunction was originally granted on motion before hearing, or on interlocutory decree after

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hearing the testimony. (a) This appears from the fact that a jury trial is allowed. R. S. 1879, § 2712. (b) All injunctions are in effect temporary, where there is appeal allowed, until affirmed by the court of last resort, as this case emphatically proves. 2. The fact that no bond was given to obtain the injunction, does not prevent an assessment of damages. R. S. 1879, § 2712. (a) This section makes no distinction between injunctions granted on bond given, and those where no bond is exacted. (b) No statute is needed to give a court of general jurisdiction authority to assess damages on dissolution of injunction. High on Injunc., § 962. This proceeding is independent of any proceeding on a bond. *Sturgis v. Knapp*, 33 Vt. 486.

Leveret Bell for respondent.

The remedy by motion to assess damages on the dissolution of an injunction is purely statutory, and forms no part of the general statutory practice. *Garcie v. Sheldon*, 3 Barb. 232; *Merryfield v. Jones*, 2 Curtis 306; *Bean v. Heath*, 12 How. 168. R. S., §§ 2710, 2711, 2712, and 2713, furnish all the statutory law governing the matter, and they provide for a motion to assess damages where a preliminary or temporary injunction is granted and bond given, and make no provision for the assessment of damages on motion in any other case. In the case under consideration, the injunction was granted at the final hearing on a trial of the case on the merits in the circuit court, and no bond was required by the statute and none was given. The motion made in the circuit court to assess damages upon the dissolution of the injunction, which dissolution took place pursuant to the mandate of the Supreme court, issued after the hearing and final determination of the case on appeal in the Supreme court, could not properly be entertained by the circuit court and was rightly discontinued by the court. *Sturgis v. Knapp*, 33 Vt. 486; *Railroad Co. v. Appelgate*, 8 Dana 310. The original case was institute

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in the circuit court of St. Louis county on May 21st, 1870, and no injunction was asked or granted. The trial of the case in the circuit court on the merits commenced March 27th, 1876, and terminated April 1st, 1876. On June 1st, 1876, a decree was entered disposing of the entire controversy, except the accounting between the gas company and the city, which was referred to commissioners, and by this decree the St. Louis Gaslight Co., was enjoined from continuing the business of making and selling gas in St. Louis. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69. No bond was given. None was required by the statute. It was the case of an injunction awarded on final hearing, and was, therefore, within the exception contained in section 2710. The plaintiff in the case was not required to execute a bond, and, in point of fact, no bond was executed, and sections 2712 and 2713 have no application here. There is no bond in the case. The motion to assess damages is not based on a bond. The motion, therefore, is simply a motion calling on the plaintiff to respond to the defendant to the extent of plaintiff's liability in the premises. The plaintiff has entered into no obligation defining or specifying its liability. The purpose of a bond is to fix and measure the liability in question. But the damage in this case arises from an injunction granted on final hearing, and it is *damnum absque injuria*, because it is the result of the action of the court itself on a full consideration of the merits of the case. *Russell v. Farley*, 105 U. S. 438.

MARTIN, C.—This was a proceeding by motion to assess damages on account of an injunction granted by the St. Louis circuit court upon final hearing and afterwards dissolved by reversal in the Supreme court.

The city of St. Louis instituted a suit in the circuit court, the object of which was to compel the St. Louis Gaslight Company to convey all its works to the plaintiff, to obtain an accounting of the rents and profits of the works and property subsequent to January 1st, 1870, with

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decree of payment of the net balance thereof over expenses, and an order enjoining the company from any further prosecution of its business and for the appointment of a receiver to take charge of the works and carry on the business until the further order of the court. No temporary injunction was asked or granted, and for that reason no injunction bond or stipulation by the plaintiff to pay damages consequent upon a dissolution of the injunction appear in the case.

After a final hearing of the case upon its merits, the remedy as prayed for by plaintiff was granted, and the property was taken from the control of the company, and all further prosecution of its business enjoined. Upon appeal to the St. Louis court of appeals, this decree was affirmed, from which action of said court the company appealed to the Supreme Court. In this court the judgments of the lower courts were reversed and the cause was remanded, with directions to the circuit court to enter a rule requiring the receiver to restore to the company all the gas-works and property held by him in virtue of the decree, together with the profits derived therefrom, and to report his action thereon to the court; and upon approval of said report to dismiss the bill. *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69. After the mandate of this reversal was received by the circuit court, the defendant filed a motion with the view of having it carried out. In this motion the court was asked to ascertain and assess damages suffered by defendant by reason of the injunction before dismissing the bill. The damages claimed were stated in the bill of particulars as resulting from the reduction in the price of gas during the litigation, from reduction in the cost of lighting, extinguishing and cleaning public lamps, from expenditures incurred by the receiver and from attorney's fees, aggregating in all the sum of \$549,475.23. Soon after the filing of this motion the court entered a final decree dissolving the injunction and dismissing the cause without

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taking any notice of that part of the motion which asked for an assessment of damages.

The application to assess damages being again brought to the attention of the court, the plaintiff moved to discontinue all further proceedings thereon, on the ground that the final decree dismissing the cause terminated the jurisdiction of the court in the premises, and on the further ground that the court had no rightful authority to assess damages against the plaintiff, in the absence of an injunction bond and interlocutory order of injunction that no damages could be assessed upon the dissolution of an injunction adjudged only at a final hearing. The motion to discontinue was sustained by Judge Adams of the circuit bench, who gave his reasons in an able and elaborate opinion, which has been furnished in the briefs of counsel. From this action of the circuit court the defendant appealed to the court of appeals in which the judgment was affirmed *pro forma*; thence it comes before us on appeal. The matter in issue involves a question of equity practice and jurisdiction as affected by our statutes relating to such questions. For a proper understanding of the issues it will be necessary to allude to the jurisdiction and practice of courts of equity in respect to damages consequent upon the dissolution of injunctions, as it existed prior to and independent of statutes.

When temporary injunctions were granted, as they frequently were upon the naked petition and *ex parte* showing of the applicant, and were afterwards dissolved on a final hearing of the cause, neither law nor equity furnished any remedy to the defendant for the damages consequent from them, however serious they might be. Such damages were regarded as flowing from the judgment and order of the court, and not from the plaintiff, if he did nothing more than to sue in good faith for the process awarded him. The injustice which so often resulted from hasty and unfounded orders of injunction, for the consequences of which the courts alone were responsible under the law, in-

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duced them to adopt as far as was in their power such measures and safeguards as might afford the defendant an indemnity against loss and injury from injunctions which ought never to have been granted. Hence arose the doctrine which recognized in courts of equity the inherent power of exacting conditions, deposits and bonds from the plaintiff before awarding him an injunction, which should in one way or another indemnify the defendant for damages suffered by him in consequence of the process discontinued or dissolved by the court at final hearing. These safeguards were originally exacted in *ex parte* hearings, but came to be required in all interlocutory injunctions, whether granted upon notice to defendant or without a hearing from him. These conditions, deposits and bonds were all in the nature of voluntary obligations on the part of the plaintiff to pay damages to the defendant in the event of a dissolution at final hearing. The method of enforcing them depended upon their nature; some were enforced by the courts of equity, while others were more appropriately enforced by an independent action at law. *Bein v. Heath*, 12 How. 168. Thus it will be seen that the liability of the plaintiff in an injunction suit to respond to the defendant for damages after dissolution depended upon his voluntary undertaking contained in the conditions of the decree, or in his separate agreement and bond given to the court or defendant for that purpose. Of course, when the process has been sued out maliciously there may be a right of action in favor of the defendant. But this right depends upon the law governing malicious prosecutions, and has no relation to the claim for damages urged by defendant in this case. In *Palmer v. Foley*, 71 N. Y. 106, Judge Folger expresses this condition of the law :

“It seems that without some security given before the granting of an injunction order, or without some order of the court or a judge, requiring some act on the part of the plaintiff which is equivalent to the giving of security such as a deposit of money in court—the defendant

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has no remedy for any damages which he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution." In *Russell v. Farley*, 105 U. S. 433, Justice Bradley, in alluding to the practice of courts of chancery in granting injunctions, says: "And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party, for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or in a proper case, an action for malicious prosecution. To remedy this difficulty the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act."

Such exemption of the plaintiff from damages, in the absence of any terms or conditions accepted by him to pay them, rests upon the broad policy of the law which regards the courts open at all times to all persons for the enforcement of their rights by civil action. Suitors are presumably acting in accordance with law when they obtain in the courts what the courts award them, and should not be punished for accepting what they could not obtain except by such orders and judgments. When a suitor procures a writ or order of injunction upon a fair presentation of facts to the court in good faith he has never been regarded as responsible in damages therefor, either in law or equity, unless he has made himself so by some voluntary undertaking. In such case he stands before the law like a suitor in any other process or proceeding. This I understand to be the rule, as universally recognized and approved. *Sturgis v. Knapp*, 33 Vt. 486; *Gorton v. Brown*, 27 Ill. 489; *Lawton v. Green*, 5 Hun. 157; *L. & O. R. R. Co. v. Applegate*, 8 Dana 289; *Palmer v. Foley*, 71 N. Y. 106; *Russell v. Farley*, 105 U. S. 433; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505. If, therefore, the plaintiff, in the absence

of an undertaking to indemnify, is exempt from damages consequent upon an interlocutory order of injunction when dissolved, *a fortiori* he will be exempt in the absence of such undertaking, when the injunction issues only after a final hearing upon the merits of the case. In this case there was no promise or undertaking of any kind to indemnify the defendant in the event of a dissolution of the injunction by reversal on appeal. I am not aware that deposits, conditions or bonds were ever exacted from the plaintiff upon the awarding of an injunction after final hearing. Without affirming I will not pretend to deny the inherent power of a court of chancery, unrestricted by statutory law, to exact such undertaking when it is advised of an appeal, and has doubts about the correctness of its decision. Under the practice in England the chancellor could suspend the operation of the injunction during appeal, when he had doubts about the correctness of his decision. Kerr on Inj. 32, second edition. Having ascertained the jurisdiction and practice of courts of equity on the matter of damages consequent to injunctions as contained in the general law independent of statute, let us consider the meaning and import of our statutes bearing upon the subject. By section 2710 it is provided that "no injunction, unless on final hearing or judgment, shall issue in any case except in suits instituted by the state in its own behalf, until the plaintiff execute a bond with sufficient security to the other party in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the plaintiff will abide the decision which shall be made thereon and pay all sums of money, damages, and costs that shall be adjudged against him if the injunction shall be dissolved." R. S. 1879, § 2710. This provision, which has been in force since 1835, is very plain in its terms. R. S. 1835, p. 314. It assumes to control the discretion of the courts in respect to safeguards for the indemnity of the defendant. and pre-

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scribes a particular one in the nature of a bond, which they must not fail to exact before issue of the order of injunction. But this command of the statute applies only to interlocutory injunctions, and expressly excepts from its operation injunctions issued on final hearing or judgment. The practice of the court in respect to such injunctions is not affected, and may be regarded as remaining in force as under the general law, which practice required no bond or condition of any sort, as we have just seen.

Section 2712, which provides for the assessment of damages on the dissolution of an injunction, relates to only such damages as the plaintiff is liable for on his undertaking. There is nothing in its language or phraseology to indicate that the legislature intended to extend the jurisdiction of the court or the liability of the plaintiff in respect to damages. The section evidently relates to damages for which the plaintiff has given his undertaking of indemnity. This is clear from the language of the subsequent section 2713, which requires the damages so ascertained and assessed to be entered in the form of a judgment against the obligors in the plaintiff's bond. Indeed, there is no provision for the assessment of damages except as incident to a bond. A suit in which no bond or undertaking is provided for by law or exacted by the court, as to any damages resulting to the defendant from a legitimate prosecution thereof, presents an instance of *damnum absque injuria*, and is like any ordinary suit which leaves the defendant heir to much inconvenience and pecuniary loss, notwithstanding a final judgment in his favor.

For these reasons I am persuaded that the action of the circuit court in discontinuing the proceedings to assess damages was correct, and that the judgment of the court of appeals affirming the judgment below should be affirmed and it is so ordered.

Ewing concurs. Phillips, commissioner, not sitting, having been of counsel in the principal case in the appellate court.

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McDONALD, *Administrator*, v. MATNEY *et al.*, *Plaintiffs in Error*.

1. **Partnership Relation:** QUESTION OF FACT. The question of the existence of the relation of partners between persons, is one of fact under proper instructions.
2. ———: JUDGMENT: THIRD PERSONS. A judgment in a suit determining the existence or non-existence of a co-partnership relation between the parties thereto, is not binding on or admissible in evidence against strangers to such proceeding.
3. **Partnership Inter Sese:** QUESTION, HOW DETERMINED. A mere participation in the profits and loss does not necessarily constitute a partnership between the parties so participating. The relation of partnership *inter sese*, is a question of intention on the part of the alleged partners, and is one to be determined by the triers of fact from all the circumstances proved.
4. **Trial without a Jury:** INCOMPETENT EVIDENCE: REVERSAL. The rule, that the admission of incompetent evidence in a cause tried by the court without the intervention of a jury, will not cause a reversal if there is competent evidence sufficient to sustain the finding, has no application, unless it is obvious that the incompetent evidence did not induce the finding.

Error to Platte Circuit Court.—HON. GEO. W. DUNN, Judge.

REVERSED.

Jas. F. Pitt for plaintiff in error.

As between the partners themselves, the test of partnership is liability for losses, *i. e.* liability of each to lose whatever money or property he has in the business as well as to answer over out of his private estate upon the obligations of the concern. The power of partners to manage and dispose of the firm property, and to wind up its affairs, are incident to this liability. *Philips v. Samuel*, 76 Mo. 657; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 170; *Campbell v. Dent*, 54 Mo. 325; *Lengle v. Smith*, 48 Mo. 276; *Whitehill v. Shickle*, 43 Mo. 537. The common law right of a surviving partner is not affected by the statute, except

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that he may after the time limited be disturbed in his administration unless within thirty days after grant of letters he gives bond provided by statute. W. S. p. 78, § 52 *et seq.* If he fails, he may have the property taken out of his possession. *Bredow v. Mut. Sav. Ins.*, 28 Mo. 181; *Mut. Sav. Ins. v. Enslin*, 37 Mo. 453; 20 Mo. 174. Probate courts have no power to compel administration, except to order the public administrator in proper cases. Hull's proceeding in the probate court was wholly unauthorized. There is no warrant for it in the law respecting partnership estates. It was *ex parte* as to the partnership debtors and creditors. The executor had no lawful possession or control of the partnership estate. *Orrick v. Vahcy*, 49 Mo. 428; *Bredow v. Mut. Sav. Ins.*, *supra*.

Vinton Pike for defendant in error.

The principle contended for by plaintiffs in error that sharing the profits of a firm business raises an irrebutable presumption that the receiver of them is a partner in the firm, has long been exploded. *Campbell v. Dent*, 54 Mo. 332; *Wiggins v. Graham*, 51 Mo. 17; *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *Phillips v. Samuel*, 76 Mo. 657; *Parsons on Part.*, (2 Ed.) p. 73; *Story on Part.*, (6 Ed.) § 49; 1 *Lindley on Part.*, p. 19. Nor does sharing the losses alter the case. Net profits include losses and an agreement to share losses in a certain proportion, is but a guarantee of the servant to indemnify the master against any impairment of his capital to that extent. *Burnett v. Snyder*, 81 N. Y. 556. To constitute one a partner he must be clothed with all the rights and powers of a principal. *Campbell v. Dent*, 34 Mo. 332; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, *supra*; 43 Barb. 438; 6 S. & R. (Pa.) 332; 6 Gill 423; 49 Barb. 265; 43 Ill. 323, 326; 19 Ind. 113; 6 Met. 82; 51 N. Y. 231. The written agreement between Beattie and Hull repels the idea that a partnership relation was intended. It does not follow that persons who are

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partners by virtue of participation in profits are entitled as such to that which produces those profits. 2 Lindley on Part., 648. The record of the probate court was properly read in evidence. *Loring v. Steineman*, 1 Met. 204; Bigelow on Estop., 145; 21 Wall. 509. The cause was tried by the court without a jury, and the declarations of law given and refused are only important as indicating the theory on which the court proceeded, and it is immaterial if improper evidence was admitted, so there was competent and legal evidence sufficient to sustain the finding. *Beck v. Pollard*, 55 Mo. 28; *Cooper v. Ord*, 60 Mo. 420.

HENRY, J.—This is an action by plaintiff as administrator of the estate of Armstrong Beattie, deceased, against defendant, James A. Matney, on a promissory note for \$450 dated December 11, 1869, payable to A. Beattie & Co., made by defendant and William A. Matney. On said note is an endorsement signed by T. B. Weakley, prior to January 1, 1877, by which he transferred to Beattie his interest in the note. The defense pleaded was that on the 1st day of January, 1877, Beattie and one James Hull, by a written agreement, became partners in the banking business at the city of St. Joseph, conducted in the name of said A. Beattie and that by the terms of the agreement and the construction placed upon it by the parties, the note sued on became and is the property of said co-partnership.

The replication put in issue the foregoing facts and also pleaded that on the 7th of January, 1879, said Hull filed his motion in the probate court of Buchanan county alleging that he and A. Beattie were co-partners in said banking business from the 1st day of January, 1877, to the date of his death and asking the court to order the administrator of said Beattie's estate to inventory said partnership estate and to give bond as administrator of said estate. That on the 24th of February, 1879, on a hearing of said motion by the judge of said court it was denied and said court then and there found and entered of record

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that said Hull was not a partner of said Beattie and such judgment remains in full force, unappealed from.

The only question in the case was whether Beattie and Hull were partners, and we have only to consider whether the court, sitting as a jury, properly tried that issue. The alleged partnership agreement is as follows:

“BANKING HOUSE OF A. BEATTIE,

ST. JOSEPH. MO., January 1, 1877.

“It is agreed and understood that A. Beattie gives to James Hull one-third of the net profits of the banking house of A. Beattie, for the year 1877, after paying \$1,200 rent, all clerk hire and incidental expenses of doing the business in all its departments; the said James Hull to attend closely to the business, under the direction of the said A. Beattie, who retains the entire control, and the said James Hull is to bear one-third part of any and all losses sustained during said term.

“Signed in duplicate. We fix rent of office, fixtures, etc., at \$1,200 per year.

“(Signed)

A. BEATTIE.

JAS. HULL.”

“Indorsement:

January 28th, 1878.

“The within agreement is hereby renewed for one year from January 1st, 1878.

“(Signed)

A. BEATTIE.

JAS. HULL.”

The testimony of Hull, who was introduced by defendant as a witness, tended to prove a partnership. M. J. McCabe testified that he and his brother-in-law were depositors in and did business through Beattie's bank and in 1877, and at other times, in conversations with Beattie he stated to Beattie that many persons objected to his bank; that in the event of his death it would be closed and their money shut up for six or twelve months and that Beattie replied that he had fixed or would fix it up and that nothing of the kind could happen. That finally in March, 1878,

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he asked Beattie about it and Beattie said he had fixed it all up with Jimmie (meaning Hull) and that no odds what happened to him the bank was all right, and also stated that there was an agreement between him and Jimmie and that in case of his death Jimmie would keep the bank open and run it as he always had and that after awhile he would let it be known.

Evidence in rebuttal was introduced by plaintiff which it is unnecessary to set out in detail. Plaintiff offered in evidence a transcript of the record of the proceedings in the probate court, showing the motion, trial and judgment, as pleaded in the replication, to the introduction of which defendant objected.

The court gave the following declaration of law.

Under the pleadings and evidence in this case, the court sitting as a jury, will find for the plaintiff, and assess his damages at the sum mentioned in the note sued on with ten per cent interest thereon from the maturity of said note.

The following asked by defendant were refused:

1. Upon the part of defendants, the court declares the law to be that if from the evidence the court believes that on and after the 1st day of January, 1877, A. Beattie and James Hull were partners as alleged in defendant's answer, and that by their construction of the agreement between them, and their action under it, said Hull had an interest in the note sued on, and that said note became the property of said partnership, and Hull interested therein at the institution of this suit, then the finding must be for defendants.

2. Upon the part of defendants, the court excludes the petition of Hull filed in the probate court, and the record of said court, and all evidence offered under plaintiff's reply in regard to the proceedings in said court, between said Hull, and the plaintiff.

Judgment was for plaintiff, and defendant's motion for new trial was overruled, and he has duly prosecuted an appeal to this court.

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If the court had given the instructions asked by defendants as well as that given at plaintiff's instance and then found for plaintiff, we think there would have been no error, because the evidence warranted the verdict and the declaration of law which was given by the court is in effect but the verdict of the court trying the issues of fact on the evidence, but it was error to refuse the first instruction asked by defendants. The agreement between Beattie and Hull was not conclusive in plaintiff's favor that there was no partnership between them, and there was evidence *aliunde* tending to prove a partnership. If the cause had been tried with a jury to pass upon the issues of fact the declaration of law made by the court would have been error as withdrawing from the jury a question which it would have been their province to determine. We are, also, of the opinion that the court erred in admitting as evidence in the cause the record of the proceedings of the probate court, and consequently in the refusal of defendant's second instruction. Hull is no party to this suit and defendant here was no party to the proceeding in the probate court, and the finding and judgment of that court that Hull was not a co-partner of Beattie in the banking business, even if conclusive against Hull, cannot bind or in any manner whatever affect third persons, entire strangers to that proceeding. "It is a general, if not universal, principle that a suit between two persons shall not bind or affect a third person who could not be admitted to make a defense, to examine witnesses or to appeal from the judgment." *Case v. Reeve*, 14 Johnson 80; *Cecil v. Cecil, et al*, 19 Md. 80. "It is a general principle fundamental to the doctrine of *res judicata*, that personal judgments conclude only the parties to them and their privies. The bar must be mutual to the parties in the latter action." *Bigelow on Estop.* 59; *Crispen v. Hannavan*, 50 Mo. 415. "It is a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger." 1 Greenl. Ev., 522. "Parties bound by a judgment"

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includes all who are directly interested in the subject matter and had a right to make defense, or to control the proceedings and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses on the other side. Persons not having these rights are regarded as strangers to the cause.

Ib. 523. There is an apparent exception, says Prof. Greenleaf, in cases "usually termed proceedings *in rem*" and, also, decisions "upon the personal status or relations of the parties, such as marriage, divorce, bastardy, settlement and the like." *Ib.* And these proceedings are binding upon others than parties "upon the ground that in most cases of this kind, especially in questions upon property seized and proceeded against every one who can be possibly affected by the decision has a right to appear and assert his own rights by becoming an actual party to the proceedings, and partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest." *Ib.*

No such reasons exist in the case of an alleged partnership, for holding a judgment in a suit between A. and B., determining its existence or not to bind one who was in no sense a party to the suit, or in privity with those who were. The personal status of the individuals who are alleged to be partners is not involved, neither are their domestic or social relations in question. The only question is one of contract, for partnership relations are based always upon contract, expressed or implied. Matney was in no sense a party to the proceeding in the probate court. He could not have become a party, had no right to control it in any manner whatever, no right to introduce or cross-examine witnesses, or to appeal from the judgment. To show the injustice of holding a stranger bound by a judgment in such a case, instances are more demonstrative than

abstract principles. Suppose that Beattie had died insolvent and Hull had ample means to pay all the debts of the firm of A. Beattie, and a creditor should sue Hull as a partner of Beattie, would it be concluded that this judgment of the probate court on a motion made by Hull, alleging the co-partnership would be conclusive, or any evidence in his favor? Or, on the other hand, reversing the pecuniary condition of the parties, and suppose Beattie's estate sued plaintiff, alleging that Beattie and Hull were partners, would the judgment in favor of the estate on Hull's motion estop the plaintiff from proving that Hull and Beattie were in fact partners? Shall a judgment rendered in a cause to which one is a stranger, determine his property rights? Under the well established and universally recognized elementary principles of law of *res judicata* this cannot be. In the case of *Henry v. Woods*, 77 Mo. 227, the opinion delivered by PHILIPS, C., fully sustains our conclusion in this case.

As this judgment will be reversed and the cause remanded, it is proper to consider briefly the question, what constitute parties partners *inter sese*. It is an entirely different question from that presented where a third person seeks to charge them as partners. The defendant, in this case, had no transaction with Beattie and Hull as partners. The note in suit was made by him to A. Beattie & Co., when that firm consisted of Beattie and Mackley, and however Beattie and Hull may have appeared to the world as partners, defendant can only maintain his defense by proof that they were in fact partners *inter sese*. "A mere participation in the profits and loss does not necessarily constitute a partnership" between the parties so participating. *Dunne v. Stone*, 30 Mo. 384; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 173; *Philips v. Samuel*, 76 Mo. 658. It is a question of intention on the part of the alleged partners and is one which the triers of the fact will have to determine upon all the circumstances proved. It would be difficult to state any one fact or stipulation

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which would be decisive of the question except a stipulation expressed that they were partners *inter sese*, and even this might be controlled by other stipulations, and the conduct of the parties in relation to the business. Each case must be determined upon its own peculiar facts.

Respondent contends that, inasmuch as the cause was tried by the court without the intervention of a jury, the declarations of law are of no importance, except as indicating the theory on which the court proceeded, and that it is immaterial that improper evidence was admitted if there was competent evidence sufficient to sustain the finding. That is correct only where it is obvious that the incompetent evidence admitted did not induce the verdict, but how can we say that the court found its verdict on the other evidence, and that the record of the probate court, to no extent, influenced its finding? How do we know that if that incompetent evidence had been rejected, the verdict would have been for defendant? It is no answer to this, that the evidence would warrant a verdict for plaintiff, even if that read had been excluded. This court is not to try the fact. That was the province of the court below, and it erred in admitting evidence without which it might have rendered a verdict for defendant, which this court could not have set aside as against the weight of evidence.

Judgment reversed and cause remanded. SHERWOOD and RAY, JJ., concur. HOUGH, C. J. and NORTON, J., dissent.

MYERS V. THE CITY OF ST. LOUIS, *Appellant.***Deed, Ambiguity in:** NATURAL MONUMENTS, CALLS AND DISTANCES

Natural monuments and objects called for in a deed shall control in case of ambiguity, although they conflict with the courses and distances called for by the deed. And when the latter, in its description of the land conveyed, calls for a river as a boundary, this call will prevail. But if doubt as to the intention of the parties should still remain, resort may then be had to evidence of the surroundings of the parties at the time of the execution of the instrument.

ON REHEARING.

Constitution: TAKING PRIVATE PROPERTY FOR PUBLIC USE: RIPARIAN RIGHTS, DAMAGE TO: COMPENSATION. Damage to the rights of a riparian owner of land on the Mississippi River in the city of St. Louis, caused by the projection of a dike by the city into the river, was within the protection of article 1, section 16 of the constitution of 1865, which provided "that no private property ought to be taken or applied to public use without just compensation."

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

The damages complained of by plaintiff are not within the protection of section 16, article 1 of the constitution of 1865, which provided "that no private property ought to be taken or applied to public use without just compensation." It is not sufficient to sustain the judgment below to show that the property of the plaintiff was *damaged* for public use. *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; *Hoffman v. St. Louis*, 15 Mo. 651; *Schattner v. Kansas City*, 53 Mo. 165; *Wegman v. Jefferson City*, 61 Mo. 55; *Foster v. St. Louis*, 71 Mo. 157; *Swineford v. Franklin Co.*, 73 Mo. 279; *Broadwell v. Kansas City*, 75 Mo. 213; *Transportation Co. v. Chicago*, 9 Otto 635; *Radcliff v. Mayor*, 4 Com. (N. Y.) 195; *Mayor v. Willison*, 50 Md. 138; *Gould v. Railroad Co.*, 6 N. Y. 522; *Tomlin v. Railroad Co.*,

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32 Ia. 106; *Burney v. Keokuk*, 94 U. S. 324; *Weeks on Damnum Absque Injuria*, § 8. By the constitution of 1875, which went into effect November 30th, 1875, and subsequent to the injuries complained of by plaintiff, property damaged as well as property taken, is brought within the protection of the law. Const. 1875, art. 2, § 21. The change made by the present constitution has a direct bearing on the question here presented. *Atlanta v. Green*, 67 Ga. 386; *Elgin v. Eaton*, 83 Ill. 536; *Chicago v. Rumsey*, 87 Ill. 348; *Reading v. Althouse*, 93 Pa. St. 400; *Pusey v. Allegheny*, 98 Pa. St. 523; *Lycoming v. Moyer*, 99 Pa. St. 615; *Transportation Co. v. Chicago*, 9 Otto 635. The eastern boundary of the corporation of St. Louis extends to the middle of the main channel of the Mississippi River. *Jones v. Soulard*, 65 U. S. 41; *Schools v. Risley*, 77 U. S. 91. The proprietor of land on the Mississippi River only owns to the water's edge, (*Benson v. Morrow*, 61 Mo. 345,) and the plaintiff acquired no interest in front of the premises occupied by him. His right to navigate the river up to his premises was one to be enjoyed with all mankind. It was not private property within the meaning of the constitution of 1865, article 1, section 16. *Thayer v. Railroad Co.*, 125 Mass. 254; *Gould v. Railroad Co.*, 6 N. Y. 522; *Tomlin v. Railroad Co.*, 32 Ia. 106. Under the leases to plaintiff, he possessed no riparian rights. It is apparent from the description in it that Front street intervened between the lot in question and the river. Where granted premises are bounded in terms by a public road which separates them from the water, they extend only to the center of the road, and the grantee is not a riparian proprietor. *Gould on Waters*, 276, 288; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepherd*, 4 Wall. 502; *People v. Colgate*, 67 N. Y. 512; *Allegheny City v. Morehead*, 80 Pa. St. 118; *Allen v. Munn*, 55 Ill. 486. The damages are flagrantly excessive; the jury awarded plaintiff the enormous sum of \$35,000 as damages to a leasehold estate having but five years to run, the fee simple value of which did not exceed \$10,000.

Glover & Shepley for respondent.

A riparian owner upon a public river has a property right in the stream, being the benefit to him of the use of the water and shore as a landing or shipping place or wharf of his own, should he see fit to construct one, and no person can with impunity destroy, encroach upon or impair (against his will) this riparian property. 1 Dillon Munic. Corp. §§ 70, 72; *Yates v. Milwaukee*, 10 Wall. 497. The question is, not whether the public also have rights, but whether riparian owner has rights. *Railroad v. Schurmeier*, 7 Wall. 272; *Dutton v. Strong*, 1 Black 25; *Natoma, etc. v. McCoy*, 23 Cal. 490; *Newhall v. Iveson*, 8 Cush. 595; *Cowley v. Kidder*, 24 N. H. 364; *Clement v. Burns*, 43 N. H. 609; *Wadsworth v. Tillotson*, 15 Conn. 366, 373; *Thurman v. Morrison*, 14 B. Mon. 367. Angell on Watercourses (6 Ed.) 741, section 553, says the banks of navigable rivers in Missouri are public highways owned by private persons, though subject to a reasonable and temporary use by the public. *O'Fallon v. Daggett*, 4 Mo. 343. The distinction between public rivers and rivers not public is immaterial to this case. By the common law, the right of the riparian owner in the soil extends to the middle line of the stream of a non-public river. The United States Supreme Court decided that it extended to the middle line of the Mississippi River. *Jones v. Soulard*, 24 How. 65; *Benson v. Morrow*, 61 Mo. 345. But whether it extends to the margin or middle line of the river in this case, or not, the riparian owner has specific and absolute rights, which cannot be taken from him arbitrarily. Among these rights are, "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public." *Yates v. Milwaukee*, *supra*; *Piersall v. Post*, 22 Wend. 425. The plaintiff's ownership in the use of the shore and stream being property, it could not be taken from him without

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just compensation. Cons. Mo. 1875, Art. 1, § 16. That the plaintiff was entitled to compensation before his property could be taken is provided for by the city charter. Rev. City Ord. 1871, p. 70, Art. 3, § 8. In every case of encroachment upon the soil of the riparian owner, or diversion of the flow of his water, if the person who thus interferes will not employ the means of appropriating the property by condemnation, and compensation to the owner, the riparian owner may have his action for damages. *Stein v. Burden*, 24 Ala. 130; *Cogswell v. Essex, etc.*, 6 Pick. 94; *Piersall v. Post*, 22 Wend. 425; *Gates v. Blinco*, 2 Dana 158. Whatever partially destroys or diminishes this right of the riparian owner is a taking of it, in the meaning of the constitution, and for every such injury the owner is entitled to compensation. *Glover v. Powell*, 10 N. J. Eq. 211, 229; *Hooker v. New Haven, etc.*, 15 Conn. 312; *Denslow v. New Haven, etc.*, 16 Conn. 98; *The People v. Canal, etc.*, 13 Wend. 355; *Walker v. Board, etc.*, 16 Ohio 340; Angell on Watercourses (6 Ed.), § 541. When power is given by statute to take private property for public use, the power must be strictly pursued. *Newark v. Elmer*, 9 N. J. Eq. 754; *Renwick v. Morris*, 3 Hill 621; *Hogg v. Zanesville*, Wright (Ohio) 130; *Knox v. Challoner*, 42 Me. 150; *Ellis v. Railroad Co.*, 51 Mo. 200; *Cunningham v. Railroad Co.*, 61 Mo. 33. The building of the dyke in question was not an exercise of any power conferred by the Charter. Power to open, improve, or repair a wharf or river-harbor is no authority to build a dyke into and across the channel of the river. There is no power in the city to create a nuisance or impair the navigation. The first step to be taken by the defendant to establish a wharf on plaintiff's property was to pay him for it; the second was to comply strictly with its power to improve the wharf, taking care not to obstruct navigation. *Knox v. Challoner*, 42 Me. 150; *Renwick v. Morris*, 7 Hill 575; *Hogg v. Zanesville*, 5 Ohio, 410; *Spooner v. McConnell*, 1 McLean 352; *Works v. Junction R. Co.*, 5 McLean 426; *Columbus v. Curtenius*, 6 Mc-

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Lean 209; *Williams v. Beardsley*, 2 Cart. 591; *Ill. River, etc., v. Peoria Bridge*, 38 Ill. 467.

Myers & Arnstein also for respondent.

The plaintiff, as a riparian owner on the Mississippi River, had the right of exclusive access to and from his lot, to and from the navigable waters of the river, and the right to have the river flow by his land as it flowed by nature. That right was property, within the protection of the constitutional provision which prohibits the taking of private property for public use without compensation. *Lyon v. Fishmongers' Co.*, L. R. 1 H. L. Cas. 662; *Dela-
plaine v. Railroad Co.*, 42 Wis. 214; *Yates v. Milwaukee*, 10 Wall. 504; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Baron & Craig v. Mayor and City Council of Baltimore*, 2 Am. Jur. 203; *Cooley's Const. Lim.*, 557; *Bowman v. Wathen*, 2 McLean 376, 383; *Chapman v. Railroad Co.*, 33 Wis. 629; *People v. Canal Appraisers*, 13 Wend. 355, 371; *Ryan v. Brown*, 18 Mich 196, 211; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. 243. The dyke was not a mere temporary inconvenience, but a permanent structure, which worked the absolute destruction of plaintiff's property. The plaintiff owned at least to the water's edge, if not to low-water mark. The original grant from the State called for the river as the eastern boundary, and plaintiff's title followed the river when thrown east by the dyke. He was entitled to the accretions. The State could set up no intervening title, nor do anything to derogate from or impair its grant. *Clement v. Burns*, 43 N. H. 609, 617; *O'Fallon v. Daggett*, 4 Mo. 343; *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Schools v. Risley*, 10 Wall. 110; Houck on Rivers, § 168, *et seq.*; *Kraut v. Crawford*, 18 Ia. 549; *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23; *Lockwood v. Railroad Co.*, 37 Conn. 387; *Jones v. Soulard*, 24 How. 51; *LeBeau v. Gavin*, 37 Mo. 556; *Public Schools v. Risley*, 40

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Mo. 356; *Benson v. Morrow*, 61 Mo. 345. The mud deposit created by the city between the bluff bank and the water's edge, as located after the building of the dyke, was, therefore, on plaintiff's land, and was itself a "taking" of plaintiff's property. Anything which permanently destroys or impairs the use is, *pro tanto*, a "taking" *Eaton v. Railroad Co.*, 51 N. H. 511; *Baron & Craig v. Mayor and City Council of Baltimore*, 2 Am. Jur. 203; *Lackland v. Railroad Co.*, 31 Mo. 181; *People v. Canal Appraisers*, 13 Wend. 392; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Bell v. Hull & S. R. Co.*, 6 Mee. & W. 699, and authorities cited under first point. The legislature could not authorize the city to take plaintiff's property without compensation to him. Article 1, section 16 of the constitution prohibited it. The legislature did not assume to authorize such an act without compensation. On the contrary, in the city charter it expressly required compensation to be made. Art. 7, § 1 of City Charter, (Laws 1870, p. 478.) The dyke being built without the authority of congress "across the channel" of the river, was, *per se*, a public nuisance, and plaintiff having suffered a special injury therefrom, was entitled to recover on that ground. *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Atlee v. Packet Co.*, 21 Wall. 389; *s. c.*, 2 Dill. 479; *Franklin Wharf Co. v. City of Portland*, 67 Me. 46; *Plank Road Co. v. Elmer*, 9 N. J. 754; *People v. Vanderbilt*, 38 Barb. 282.

SHERWOOD, J.—Action for damages done to plaintiff as the owner of certain riparian rights on the Mississippi river in the city of St. Louis. He was the owner of a certain leasehold, on which his saw-mill was situated, and the injury complained of consisted in the so-called improvements in the shape of a dike, or something of that sort, which the city had built, extending out into the channel of the Mississippi river several hundred feet, thereby filling up the channel at that point and causing such a deposit of sediment or mud next to the shore as effectually destroyed the

landing place which plaintiff had been accustomed to use for the purpose of bringing logs to the shore in front of his mill, and caused also the submersion and loss of his logs. The lease under which plaintiff claimed, is in these words: "A lot of ground in St. Ange addition to the city of St. Louis, a plat whereof is on file, etc., * * * having a front of 162 feet on Front street, as laid out on said plat, and extending west to Second street, excepting a sixty foot street called First street, and an alley between said First and Second streets, which said street and alley are to be left open for public use; bounded north by land of Harney, east by the Mississippi river, south by Bryan street and west by Second street, as laid out by said plat, in block No. —, in the city of St. Louis."

Under a proper construction of this lease we have no doubt that the plaintiff was the possessor of riparian rights. It is true that in the lease the recital is made that the lot of ground has "a front of 162 feet on Front street," etc.; but this recital, in our opinion, constitutes no part of the metes and bounds of the lot, and is by no means inconsistent with, or repugnant to that portion of the lease in which the boundaries of the leased ground are definitely and distinctly described. Besides, one of the first rules of construction, in case of ambiguity arising in a deed, is that natural monuments and objects called for in the deed shall control, though they should conflict with the courses and distances called for in the deed. And when such deed, in its description of the grant of land made, calls for a river as a boundary, this call will prevail. *Shelton v. Maupin*, 16 Mo. 124; 3 Washburn R. Prop., pp. 405, 406, 407, 408, and cases cited. And if doubt as to the intention of the parties to the deed in question should still remain, resort could be had to the surroundings of the parties at the time the lease was executed. *Ib.*, 404; 1 Greenlf. Ev., § 288. The land leased had been in the possession of Mrs. Boyce, the lessor, since 1851. It had been leased by her to Ludlow & Co. many years, and that firm had built a saw-mill on it and had used the

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facilities furnished by the river for getting saw logs to the mill, just as Myers & Vollkamp, their successors, continued to do after the lease was made to them. Taking all these things into consideration, it would seem impossible to differ as to the proper conclusion to be reached touching the force and effect of the terms employed in the lease. Counsel for defendant cites us to the case of *Schools v. Risley*, 10 Wall. 91, as deciding that calls for the Mississippi river, in conveyances from one private individual to another for lots in St. Louis, give no riparian rights to the grantee. The syllabi of that case do decide that point, but the opinion of the court does not. The only point in judgment there, was that if the property owned by the defendant, a certain block, was bounded on the east by a street, passage-way or tow-path, that then the defendant was not the possessor of riparian rights, and of consequence not entitled to the right of accretion as incident to those rights; but that such rights were possessed by the defendant, if the river, when the town of St. Louis was laid out, and when the act of confirmation has passed, constituted the eastern boundary of the block. This view of that case and what it decided certainly accords with the authorities cited therein with approval; *Jones v. Soulard*, 24 How. 41; *Smith v. Public Schools*, 30 Mo. 301; *LeBeau v. Gaven*, 37 Mo. 556; and with the view taken in the same case in this court [40 Mo. 358], the judgment of this court being affirmed on appeal, where it is expressly decided, reference being made to the same authorities, that if the river is the boundary of a town lot it will be riparian as much as would a tract of land in the country. This view accords also with that taken in *Yates v. Milwaukee*, 10 Wall. 497, where it is held that the owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

The force and effect of the terms of the lease to Myers & Vollkamp were not discussed in the court of appeals, and the point already noticed seems to have been presented in

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this court for the first time. No doubt is entertained by us that plaintiff's leasehold extended to the Mississippi River and that he was the owner of all such rights as the law will imply from that fact. On this point, and so far, we are all agreed; but a majority of the members of this court regard the injuries which plaintiff suffered as consequential merely, and that, therefore, he cannot maintain his action. I concede that if the damage suffered by plaintiff, as the result of the acts of the city, were of that nature, that no recovery could be had by him, and such was our ruling in the last utterance of this court on that subject. *Broadwell v. City of Kansas*, 75 Mo. 213. In that case a recovery was allowed by us on the ground that the injury declared on was not consequential but a direct physical invasion of the property of the complainant. I think, considering the nature of the property, that the taking in this case is equally direct as in that, and as much forbidden by the constitution, and that the destruction of riparian rights is a taking. On this point I entirely concur with Judge Bakewell of the court of appeals, where he says: "When it is settled that riparian rights are property, and of this there seems to be no doubt, the question as to the right to take them without compensation is at an end." *Myers v. City of St. Louis*, 8 Mo. App. 266.

The authorities cited by the respective parties to this controversy need not be discussed. It is sufficient to say that they have been examined by us, and differing conclusions have been reached, as already stated. Owing to the view taken by a majority of the members of this court that the damages complained of by plaintiff were not of such a nature as to be within the protection or prohibition of the constitution of this State, the judgment as well of the court of appeals as of the circuit court must therefore be reversed; in which reversal I do not concur.

HENRY, J.—In the opinion delivered in this case by Sherwood, J., for the court, the facts are not sufficiently

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stated to show the grounds upon which the judgment of the court of appeals was reversed. The construction of the dike in question was authorized by an act of the general assembly of this State and the injury sustained by plaintiff was not the immediate consequence of its construction, but was the result of deposits of sediment from time to time, not culminating in the injury complained of until months after the construction of the dike. The saw-logs were not immediately submerged, nor was the riparian right claimed by plaintiff immediately affected by the construction of the dike. I may add, also, that the dike was constructed in 1874, before the new constitution went into effect, and there is no allegation that it was negligently or carelessly constructed, but only that it was an unlawful and unauthorized act.

RAY, J.—I do not concur in the opinion of the majority of the court, nor indeed with some of the views expressed by Sherwood, Judge, in his opinion.

In order to the affirmance of this judgment it is not necessary upon the facts of this record to inquire or determine whether there has been a taking of private property for public use without just compensation, but it is sufficient if it appears, as it clearly does, that the act complained of is a wrongful act, and has been done without competent authority. The petition charges that "defendant unlawfully caused a certain dike, composed of limestone and other materials, to be built in said river, commencing at the foot of said Bryan street and extending thence eastwardly a distance of over 700 feet, into and across the said natural channel of said river, said dike being about twenty feet broad and extending from the bed to the surface of said river, which said dike was an obstruction to the navigation of said river, and was built against the protest of plaintiff and without warrant of law." If that be so, and it further appears, as the record abundantly shows, that the plaintiff in consequence thereof, has sustained a special damage peculiar

to himself, then he is entitled to recover. In such cases it is wholly immaterial whether the injury be to person or property, direct or consequential. Wood on the Law of Nuisances, § 621. If the river in which the dike in question was built had been an inland stream over which the State of Missouri had exclusive jurisdiction, then the positions contended for, and the authorities cited might have been applicable to this case. Wood on Law of Nuisances, §§ 302 and 596.

In the case at bar, however, the Mississippi river being a public navigable river of the United States, and a highway of commercial intercourse between the states, the general government has the ultimate and paramount jurisdiction; and the dike in question being an obstruction materially interfering with its navigability, and the defendant failing to show any such competent authority to construct the same, he is, therefore, liable to the plaintiff for such special damage peculiar to himself as he may have sustained by reason thereof, whether direct or consequential. If the dike in question had been shown by the evidence to have been but a slight obstruction to navigation then, perhaps, under the limited and subordinate jurisdiction of the State, it would not be regarded as a nuisance if the public benefit therefrom is equal to the inconvenience created to navigation. But this qualification is subject to the restriction that the State may not authorize a material obstruction to navigation. When such an obstruction, materially interfering with the use of the steam for the purposes of public passage, is erected even under authority from the State it is, at least, so far a nuisance that the party erecting it will be liable for all damages resulting therefrom to individuals; and the authority conferred by the State in such cases is no protection or defense to the action. Wood on Law of Nuisances, § 596, 597, 621 and authorities there cited.

I am, therefore, of the opinion that the judgment of the court of appeals should be affirmed.

On Rehearing.

SHERWOOD, J.—The cause has been re-argued. From that re-argument I have been more than ever convinced that the judgment recovered by the plaintiff in the circuit court and afterwards affirmed in the court of appeals is based on the most solid foundations of reason and authority. In the opinion of the court of appeals the subject of the destruction of riparian rights and the reciprocal right of compensation for such destruction has been fully discussed, and reference made to numerous authorities, which abundantly sustain the position of the plaintiff here, and I simply refer to them and to other authorities cited for plaintiff in this court as fully applicable to the facts of this case, and as sustaining in a very satisfactory way the opinion of the court of appeals. The whole subject may be summarized thus :

The plaintiff was the possessor of certain riparian rights. These rights were property. Of that property he could not be deprived without just compensation, nor could the State itself either exercise such a power of deprivation or confer it upon some subordinate municipality dissevered from the constitutional condition of compensation for the property taken. And the destruction of the property right in question was a taking within the meaning of the constitution of 1865, and of the authorities cited on behalf of plaintiff.

On the original argument the point was made for defendant that a recovery was had for damages done after suit brought. This is not true in point of fact. The injury was done prior to suit brought, but the full consequences thereof did not appear until resort was had to the courts for redress. The case in this respect is not unlike the case of injury to a person where a blow is received before suit brought, but where the full extent of the injury done does not make itself manifest until long after action begun. But for all

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that, the injury is none the less direct, none the less concurrent and contemporaneous with the blow, though the damage done is not at once fully apparent.

For these reasons the judgment of the court of appeals affirming that of the circuit court should be affirmed. NORTON and RAY, JJ., concur; HOUGH, Chief Justice, and HENRY, J., dissent.

TYDINGS et al. v. PITCHER et al., Appellants.

1. **Deed: CHAIN OF TITLE: PURCHASER.** A deed lying outside of a purchaser's chain of title, imparts no notice to him.
2. **Chain of Title: NOTICE: PURCHASER.** A purchaser is bound with constructive notice of all recorded instruments and recitals therein, lying within his chain of title.
3. ———: **VENDOR'S LIEN: NOTICE.** A recital in a deed in a purchaser's chain of title that a part of the purchase money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to every fact that the existence of the lien would imply or lead to.
4. ———: ———. Such purchaser is put upon inquiry as to the fact that the lien may have been extinguished by an unrecorded deed reconveying the premises to the former owner.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge.

AFFIRMED.

Harding & Buller and Phelps & Brown for appellants.

The recital in the second deed made by Rickerson to Tieman, dated March 6th, 1861, that a sale previously made by him to Tieman was null and void, did not cancel the first deed, nor was it such a recital of record as to constitute notice of the unrecorded deed of Tieman to Rickerson of November 16th, 1860. *Roberts v. Grace*, 16 Minn. 126;

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2 Am. Lead. Cases in Eq., pp. 144, 161; *Seely v. Holland*, 1 Swan 396. A purchaser of land is only affected with notice of conveyances lying in the chain of title. 10 Mo. 34; 2 Washburn Real Prop., (2 Ed.) p. 630; *Dingman v. McCollum*, 47 Mo. 372. And if he finds a good deed to his vendor, he is not bound to look any further, much less is he bound by any deed outside of that title. 7 Watts 382; 10 Ohio 83; 1 John. Ch. 573; 14 Mass. 303; *Trull v. Bigelow*, 16 Mass. 405; *Bank v. Beveridge*, 15 Minn. 205. Pitcher being a *bona fide* purchaser at a sheriff's sale, is protected as against a prior unrecorded deed. *Draper v. Bryson*, 26 Mo. 108. The court erred in permitting plaintiff to introduce in evidence the unsealed instrument purporting to be a deed from Tieman to Rickerson. *Mastin v. Halley*, 61 Mo. 196; *Dougherty v. Mathews*, 35 Mo. 520.

J. C. Cravens for respondent.

The recital in the deed from Rickerson to Tieman, that \$515 of the purchase money remained unpaid, was notice to Pitcher of an outstanding equity in favor of Rickerson. *Major v. Buckley*, 51 Mo. 229; *Johnson v. Gwathmey*, 4 Lit. (Ky.) 317; *Thornton v. Knox*, 6 B. Mon. 74. Notice of this equity made it incumbent as a matter of law on Pitcher to examine the records further for a release or discharge of the lien. 3 Washburn on R. P. (4 Ed.) 596; *Jackson v. Livingston*, 10 Johns. 874; *Reeder v. Barr*, 4 Ohio R. 155; *Fitzhugh v. Barnard*, 12 Mich 105; R. S., § 692. It is a settled rule of evidence, that the recitals in deeds, patents and instruments of like character, are binding on the parties and all privies whether in estate, blood or law. *Durette v. Briggs*, 47 Mo. 360; *Carver v. Jackson*, 4 Pet. 1; *Groff v. Castleman*, 5 Rand. 195; *White v. Foster*, 102 Mass. 375; *George v. Kent*, 2 Allen 16; *Carver v. Astor*, 4 Pet. 79; *Baker v. Mather*, 25 Mich. 51; *Scott v. McCulloch*, 13 Mo. 13. The effect of recorded instruments as to notice is not confined to deeds or sealed instruments, but covers

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"every instrument in writing that conveys any real estate or whereby any real estate may be affected in law or equity, proved and acknowledged, etc." 1 R. S., §§ 691, 692; *McClurg v. Phillips*, 57 Mo. 214. The legal title to the land being in the state till Dec., 1868, the various sales and transfers up to that time could in any event pass only an equitable estate. The purchaser of an equity is bound to take notice of a prior equity, and as between equities the prior one must prevail. 2 Story's Eq. (11 Ed.) § 1502; *Vattier v. Hinds*, 7 Pet. 252; *Boone v. Childs*, 10 Pet. 177; *Nelson v. Wishon*, 68 Mo. 387. There is no evidence that either Vernon or Shriver purchased from Pitcher for a valuable consideration and without notice. They should have averred and proved every fact necessary to make them innocent. *Harris v. Norton*, 16 Barb. 264; *Boone v. Childs*, 10 Pet. 210; *Lloyd v. Lynch*, 28 Pa. St. 419; *Duncan v. Johnson*, 13 Ark. 190.

MARTIN, C.—This was a suit in equity to divest defendants of title to a tract of land and vest the same in plaintiff, Catharine E. Tydings. It was commenced on the 24th day of April, 1877. The only point in the case, necessary to consider, involves the question of constructive notice, to purchasers of land, of outstanding titles or equities.

The land is a part of what is known as the "Swamp Land Selection," donated to the State by act of congress. The title of both sides to this controversy starts from William A. Tieman. The defendants' chain begins with a judgment in an attachment suit against Tieman in which the land was attached in favor of one Nathan Bray on the 11th of September, 1866. At the execution sale which came off on the 6th of October, 1866, the defendant, Oliver S. Pitcher, became the purchaser and received the sheriff's deed for the land. In November, 1867, Pitcher, by virtue of his title as evidenced by the sheriff's deed, obtained a deed from the county of Jasper; and in December, 1868, he acquired a patent from the State. In April, 1869, Pitcher

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conveyed to Vernon, and in November, 1870, Vernon conveyed to defendant, Shriver, the present possessor of the land. Mrs. Tydings' title rests upon a deed from William A. Tieman dated November 16th, 1860, to W. C. Rickerson, her former husband. Rickerson, by deed of April, 1861, conveyed to Moses R. Harris, and on the 10th of July, 1861, Harris conveyed to the plaintiff, Mrs. Tydings. It seems that Rickerson owned the land before Tieman acquired title and on the 27th day of February, 1860, conveyed it to him by warranty deed. The deed of Tieman conveying the land back to Rickerson in November, 1860, seems to be without any seal, although it recites the affixing of seals. It was not recorded till June 6th, 1867. It was again recorded September 4th, 1878. Both of these recordings were subsequent to the purchase by Pitcher.

In the deed of Rickerson to Tieman of February 27, 1860, is contained the following recital: "Witnesseth that the said William C. Rickerson and Catharine his wife for and in consideration of the sum of \$720 to-wit: \$25 cash and other considerations, consisting of notes of this date amounting to \$515, the receipt whereof is hereby acknowledged, do hereby grant bargain, sell, etc." This deed was acknowledged and recorded in April and May, 1860. On the 16th day of March, 1861, was recorded another deed from Rickerson to Tieman, dated March 6, 1861, which makes conveyance of other property therein described for a recited consideration of \$1,500. In this deed occurs the following *habendum* clause, which, it is claimed, refers to the land in controversy and the unpaid purchase notes mentioned in it:

"To have and to hold upon this express condition: Whereas, the said William Tieman executed two certain promissory notes for about \$300 each to William C. Rickerson, said notes are described in a deed of conveyance from said Rickerson to the said Tieman, which sale is null and void, and the notes are to be used for the payment of the within named land. The land on which the notes were

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given is as follows, to-wit: the southeast quarter of the south half of section 1, township 29, range 32, containing 160 acres; also three other promissory notes dated September 25, 1860, each for \$239.60, due twelve, twenty-four and thirty-six months after date. It is expressly understood that when the above described notes are paid the said Rickerson binds himself to warrant and defend the title to the land to the said Tieman," etc.

The only oral testimony submitted by defendants at the trial came from Mr. Pitcher, who, in substance, testified that when he bought the land in 1866, he was living close to it and owned a good deal of the land in the neighborhood; that he saw it advertised for sale and went to Mr. Bray, the execution plaintiff, to inquire about the title; that he was told by him it was good and was advised by him to buy the judgment if he wanted to buy the land; that he bought the judgment, paying its full value; that he had no notice till long after the sale of any adverse claim to the land; that he examined the records before the sale and found the deed from Rickerson to Tieman of February 27, 1860, and concluded that the title was good, as he found no deed from him; that he did not see the record of the second deed between Rickerson and Tieman of March 6, 1861, until several weeks or months after the sale, when he examined the records again; that he bought the land largely upon the representations of Mr. Bray; that he was a lawyer by profession but was not practicing at that time, but commenced again within a year after that time; that he never saw the deed of March 6, 1861, revoking the prior deed until, at least, six months after he had bought the land, and that he did not care anything for the other land levied upon under the same execution as it was rocky and worthless and was bid in by him only as incidental to his other purchase. The court upon this evidence rendered its decree divesting the defendants of all title to the land, and vesting the same in plaintiff and adjudging that plaintiff have nothing by way of rents and profits but that they

should be offset with defendants' improvements. From this decree the defendants appeal.

Unquestionably a deed of conveyance, or instrument of any kind, lying outside of the chain of title, will impart no notice to a purchaser. *Crockett v. Maguire*, 10 Mo. 34; *Dingman v. McCollum*, 47 Mo. 372; *Burke v. Beveridge*, 15 Minn. 205. In accordance with this principle, the second deed of Rickerson to Tieman, made and recorded more than a year after he had parted with his title by a former recorded deed, would constitute no notice of itself or any recital in it. It may be passed here without further consideration. But it is equally true that a purchaser is bound with constructive notice of all recorded instruments in the chain of title he is buying, as well as all recitals in them. *Scott v. McCulloch*, 13 Mo. 13; *Durette v. Briggs*, 47 Mo. 356.

In obedience to this principle it becomes necessary for us to consider the effect of the recital in the first deed of Rickerson to Tieman, because that deed forms a necessary link in the chain of title to the land sold at sheriff's sale, and purchased by Pitcher. The purchaser must be held to have had constructive notice of this recital, and he admits in his testimony that, prior to his purchase, he examined the records and found this deed, so that he must be regarded as having actual notice of the recital. He was informed by the recital in the deed, that the purchase money remained unpaid, as to the greater portion of it, and that the amount still due was evidenced by promissory notes. Upon these facts our law raises an implied lien, or incumbrance upon the land, which is presumed to exist in every case in the absence of a waiver of it. This lien is binding on all parties dealing with the land, after notice of the lien. A declaration in a deed of conveyance that the purchase money, or any part thereof, remains unpaid is notice of the existence of a lien for it, in the absence of language indicating a waiver or extinguishment of the lien. *Major v. Buckley*, 51 Mo. 227; *Orrick v. Durham*, 79 Mo. 179. Having actual and constructive notice of this lien, Mr. Pitcher, as pur-

chaser of the land, was put upon inquiry of every fact which the existence of the lien would imply, or naturally lead to. In the language of Commissioner Leonard of New York: "The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, *with reasonable prudence or diligence ought to become acquainted*. If there is sufficient contained in any deed or record which a prudent purchaser ought to examine *to induce an inquiry in the mind of an intelligent person*, he is chargeable with knowledge or notice of the facts so contained. *Cambridge Valley Bank v. Delano*, 48 N. Y. 336.

In a case in which the effect of a reference to an old uncanceled mortgage was made in a deed, the supreme court of Michigan says: "The mortgage was given in 1832 instead of 1830 or 1831, twenty-four years before the deed. Here was sufficient notice to have put J. L. Barnard and his grantor on inquiry. With such notice before them, they cannot, in good faith, claim anything in opposition to the mortgage and rights that have accrued under it. Had they gone to Howard and Wadhams for information, as they should have done, they would have been informed of the foreclosure, and of the purchase by them at the master's sale." *Fitzhugh v. Barnard*, 12 Mich. 104. In *Acor v. Westcott*, 46 N. Y. 384, the judge rendering the opinion of the court remarks: "Constructive notice may be said to be a knowledge by the purchaser of some facts which should put him upon inquiry, and require him to examine other matters that would generally unfold the true title." The import of the authorities generally is to the same effect. *Nute v. Nute*, 41 N. H. 60; *Hamilton v. Nutt*, 34 Conn. 510.

When Mr. Pitcher thought of buying the judgment and acquiring title to this land, what inquiry was suggested by the recital in the deed? He was informed of a lien ex-

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isting in favor of the vendor, amounting with interest to about \$700, more than he expected to pay or did pay at the sale. This lien was, also, evidenced by promissory notes which he must have known would continue the lien for ten years at least from their date, unless sooner extinguished by payment or satisfaction of some kind. It was clearly incumbent on him, as a man of ordinary prudence, to make proper inquiry as to the continued existence of this lien. The character of the inquiry is suggested by and rises naturally from the character of the incumbrance. Under the ordinary methods of business governing transactions of this character, a release of this lien would not appear of record, so that it was perhaps unnecessary to look at the records with any well grounded expectation of finding it there. The lien was not reserved by deed nor was it created by any instrument. The most that can be said is that its existence is incidentally alluded to in a deed. The lien itself was a mere creature of equity, depending for its origin and existence upon the fact of non-payment of the purchase money. It exists and is protected in equity, independently of records and instruments recognizing or creating it. Unquestionably it was incumbent on him as a prudent man to make inquiry of the parties to this lien to ascertain what had become of it. The holder of the notes and the maker of them were indicated in the recital which informed him of the lien. The existence of the notes and the lien itself pointed to them as the proper source of information as to their payment and satisfaction. If he had made this inquiry he would, in all probability, have learned that the notes and lien had been discharged by reconveyance of the land and that they constituted the consideration of such conveyance. The unsealed and unrecorded deed which left Tieman without any beneficial interest in the land would have come to light. The possibility that if he had made inquiry of them he might have been falsely informed, or might have failed to obtain the information, could not relieve him from the ordinary dili-

gence of actually resorting to these sources of information in order to discharge the obligation of inquiry put upon him by the actual notice he had of the lien. *Williamson v. Brown*, 15 N. Y. 354.

Now, this is precisely what Mr. Pitcher according to his own testimony failed to do, and what he made no attempt to do. Neither does he offer any excuse for these omissions. The fact that he was a lawyer possessed of more than ordinary knowledge of the matters to be investigated ought not to detract from diligence imposed on him as a purchaser. For these reasons I am persuaded that Mr. Pitcher, and those deriving title from him, are chargeable in equity with notice of the incumbrance and with the deed by which alone it was discharged from the land. While the record of the revoking deed of Ricker-son is no notice, as it stands outside of the record chain of title, yet it is competent evidence to prove the way in which the lien was discharged after the evidence has subjected the defendants to the equity of Tieman's deed, and thus made it a part of the chain of title. The amounts of the notes representing the unpaid purchase money are somewhat generally designated in the revoking deed. But the language of the deed itself indicates that they are the same notes, so that no material discrepancy is apparent.

The decree is affirmed. PHILIPS, C., concurs. EWING, C., having been of counsel, did not sit; SHERWOOD, J., absent.

Rutherford v. Heddens.

RUTHERFORD, *Appellant*, v. HEDDENS.

Constitution: SPECIAL LAW. The act of the general assembly, approved March 28th, 1881, authorizing cities acting under special charters, and containing more than 30,000 and less than 50,000 inhabitants, to establish a system of sewerage and to construct, establish and keep in repair sewers, culverts and drains, is not a special law, and as such, prohibited by the constitution.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

H. K. White for appellant.

The act in question is constitutional. *State ex rel. v. Herman*, 75 Mo. 340; *Kilgore v. Magee*, 85 Pa. 411. The constitution is not a grant of powers to the legislature, but its province is to bind and restrain the power which the legislature possesses, independent of the limitations in it. *Cooley on Const. Lim.*, (4 Ed.) p. 107; *C. & St. L. R. R. Co. v. Warrington*, 92 Ill. 157; *Richards v. Raymond*, 92 Ill. 612. Unless the act in question clearly conflicts with the provisions of the constitution, it cannot be declared void. *St. Louis Co. v. Griswold*, 58 Mo. 175; *State v. Able*, 65 Mo. 357.

Ramey & Brown, Strong & Mosman, Spencer & Hall for respondent.

The act in question is a special and local law, and as such is unconstitutional. Const., art. 12, § 2; art. 9, § 7; R. S. 1879, art. 1, chap. 89.

HENRY, J.—The only question submitted for our consideration is the constitutionality of an act of the general assembly, approved March 28, 1881. Sess. Acts of 1881, pages 69, 70, 71. It is entitled: "An act authorizing cities acting under special charters, and containing more than

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30,000 inhabitants, to establish a system of sewerage, and to construct, establish and keep in repair, sewers, culverts and drains." The body of the act authorizes the mayor and council of all cities in this State having, and such as may hereafter contain, more than 30,000, and less than 50,000 inhabitants, to establish a system of sewerage, and to hold, and to construct, and keep in repair, sewers, culverts and drains, when the same may be deemed necessary to convenience and health.

This is a suit against defendant to collect a special tax assessed against his property for sewerage work done in front of it, under an ordinance passed in conformity with said act. Respondent contends that the act of 1881 is special legislation, and, therefore, forbidden by section 53, article 4 of the constitution, which declares that: "The general assembly shall not pass any local or special law: * * Regulating the affairs of counties or cities; * * incorporating cities, towns, or villages, or changing their charters, * * or creating corporations, or amending, renewing, extending or explaining the charter thereof." By section 7 article 9, the general assembly is required to provide, by general law, for the organization and classification of cities and towns, the number of classes not to exceed four, and to define the power of each class, and to give to each member of a given class, the same powers, and subject it to the same restrictions as are given to, and imposed upon the other members of that class. Also, to make provision by general law, whereby any city, town, or village, existing by virtue of a special or local law, may elect to become subject to the general law.

The legislature has discharged its duty under that section, but the city of St. Joseph has not elected to become subject to the general law, as is the case with many other cities, towns and villages in the State. It is contended by respondent that while in this condition, the charter of the city of St. Joseph can never be amended, not under the general laws, because they can be made applicable only to the four classes

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established by the constitution and the law, and not by a special law, because the enactment of such laws is forbidden by the constitution. It is assumed that the constitution is hostile to existing special charters, and that by the sections above mentioned, it was the intention to force all cities, towns and villages to surrender their respective charters, and come under the general law. We can gather from the instrument no such intent. If such hostility to special charters was entertained by the convention which framed the constitution, it could have been easily expressed by a requirement, that all cities, towns and villages in the State, having special charters, should be subject to the provisions of the general law, which the legislature was required to pass for their classification. Unquestionably the charter of the city of St. Joseph cannot be amended by a special law, but, is the act of 1881 a special law?

If we correctly construe the opinion delivered by this court, in the case of the *State ex rel. v. Herrman*, 75 Mo. 340, and the cases there cited, the principles they announce uphold the act of 1881 as general, and not special legislation. The case first cited is the *State v. Hammer*, 42 N. J. Law 435. A law of that State provided that: "In any city where a board of assessment and revision of taxes now exists, such board shall," etc. There were but two cities in the State having such a board, and the court observed that: "The result, therefore, is, that the act was intended to apply, and that it does, and must ever apply to those two cities alone, and the legal effect of the law as now constituted, is the same as though it had in express terms, declared that it was not to be operative through the State at large, but only in the cities of Elizabeth and Newark." In *Wheeler v. Philadelphia*, 77 Penn. St. 338, it was contended that an act of the legislature was in conflict with a provision of the constitution similar to ours, with respect to special legislation, because there was but one city in the State, to which it could then possibly apply, but the court observed that: "The argument is plausible, but unsound. It is

true, the only city in the State, at the present time, containing a population of 300,000, is the city of Philadelphia. It is, also, true, that the city of Pittsburg is rapidly approaching that number, if it has not already reached it, by recent enlargements of its territory. Legislation is intended not only to meet the wants of the present, but to provide for the future. It deals, not with the past, but, in theory, at least, anticipates the needs of a State, healthy with a vigorous development. It is intended to be permanent." Because the law was applicable to any city that might thereafter contain a population of 300,000, it was held constitutional; and in the *Com. v. Patton*, 88 Penn. St. 258, the same learned judge who delivered the opinion in *Wheeler v. Philadelphia*, speaking of a law of that State enacted in 1878, observed that it made no provision for the future, in which respect it differed from the act of 1874, considered in the *Wheeler case*, under which future cities, and those then in existence, on reaching the given population, could acquire the powers, and obtain the benefits, conferred by the act. In that respect, the law considered in the case of the *Com. v. Patton*, is similar to that which was passed upon in *Devine v. Cook*, 84 Ill. 590, which, by its terms, as construed by the supreme court of that State, was limited in its operation, to counties containing over 100,000 inhabitants, and, in that feature is similar to the act construed by this court in the *State ex rel. v. Herrman*, supra.

These cases are all cited in the opinion delivered in that case, and the review of those adjudications concludes with the following remark: "Counsel for Herrmann cite other authorities which fully support those already cited, and there seems to be an entire unanimity in the later authorities in holding that laws such as have been already quoted and discussed, fall under the ban of constitutions similar to our own;" and that the laws there held as "falling under that ban," are those which were restricted in their application to one or more towns or cities, with no provision by which those subsequently attaining the number of in-

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habitants specified in the act, might enjoy the benefits, or powers conferred by the act. The following language is conclusive: "The notary act, it will be observed, both in its title and in its first section, applies only to, "all cities having a population of 100,000 inhabitants or more," and "taking judicial notice then as we must, of the official records of the census, so far as relating to the State, we find that St. Louis was the only city in the State possessing 100,000 inhabitants, *at the time of the passage of the act*, or which, by the usual increase of population, could be expected to have that number when the act took effect. This then being ascertained, the city of St. Louis, under the authority cited, is to be regarded as the city intended, and the only city intended, as much so as if *called by name*." The court, it will be observed, construed the act as embracing only such cities as contained 100,000 inhabitants when it took effect.

By the act of 1881, however, not only to all cities then having a population exceeding 30,000 and less than 50,000 was given the authority to establish a sewerage system, but upon any or all such as might thereafter contain such population, the same authority is conferred, and we are of the opinion that such legislation is not special legislation within the meaning of the constitution.

The circuit court held otherwise, and sustained a demurrer to plaintiff's petition and rendered a judgment against him, which is reversed, and the cause is remanded. All concurring except HUGH, C. J., absent.

STAFFORD *et al.* v. FIZER *et al.*, Appellants.

1. **Taxes:** LIEN OF THE STATE FOR SUPERIOR: JUNIOR OR INFERIOR INCUMBRANCE: EJECTMENT. The lien of the State for taxes takes precedence of and is superior to all other liens, whether prior or subsequent. But in a suit to enforce such lien, the holder of a junior or inferior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the superior or tax lien. And the trustee is not a competent party to foreclose by suit, without joining the beneficiary with him. But the purchaser under the superior lien has the superior legal title, which the holder of the junior or inferior lien cannot successfully resist in an action of ejectment for the recovery of possession.
2. **Evidence:** AGREEMENT BETWEEN PARTIES TO SUIT. An agreement between parties plaintiff and defendant litigating the title to land, made for the purpose of effecting an amicable disposition of the crops and rents and securing the *terre tenant* in possession for the remainder of the year, whichever party should prevail in the controversy and which, by its terms, was not to affect the rights of the parties to the title, cannot be invoked for the purpose of prejudicing the rights of either party to such litigation.

Appeal from Saline Circuit Court.—HON. J. P. STROTHER,
Judge.

AFFIRMED.

Smith & Krauthoff with *Boyd & Sebree* for appellants.

(1) The suit was prematurely brought. To have entitled plaintiff to recover, it was necessary for her to show that at the time of the commencement of the suit, defendants were in possession and that plaintiff had the right to the possession. R. S. 1879, § 2247. This was clearly negatived by the stipulation in the contract. In this state, plaintiff cannot recover in ejectment unless the "legal title was vested in him at the time of bringing the suit." *Norfleet v. Russell*, 64 Mo. 176; *Ford v. French*, 72 Mo. 250; *Dunlap v. Henry*, 76 Mo. 106. Plaintiff can not recover where it appears he had "no cause of action at the time of

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the bringing his suit." *Norcune v. D'Oench*, 17 Mo. 98; R. S. 1879, § 2247. (2) H. Clay Cockerill's title to the land in dispute cannot, in any way, be affected by the back tax suit, for the reason that neither the heirs nor legal representatives of Thomas N. Cockerill were parties to the same. They were necessary parties. Acts 1877, p. 386, § 6; Blackwell on Tax Titles (4 Ed.) §§ 420, 423; R. S. § 3465; *State ex rel. Petts v. Staley*, 76 Mo. 158; *Seibert v. Allen*, 61 Mo. 488; *City of Kansas v. Railroad Co.*, 77 Mo. 180. In equity, all parties materially interested in the subject matter of the suit, ought to be made parties plaintiff or defendant. 1 Story's Eq. Pl., § 76; *Williams v. Bankhead*, 19 Wall. 563. And the rule is the same in legal actions. Bliss on Code Pl. §§ 77, 78. The legal representative of the estate of the deceased not having been made a party to the back tax proceeding, neither he nor the defendant, H. Clay Cockerill, is concluded by it. *City of St. Louis v. Richerson*, 76 Mo. 470; Cooley on Tax, pp. 265, 266, 572. In proceedings *in rem* publication or personal citation is essential to give jurisdiction. Waple's Res. Adjudicata, 125, §§ 87, 625; *Corwin v. Merritt*, 3 Barb. 341; Blackwell on Tax Titles, p. 237; *Chase v. Hathaway*, 14 Mass, 222; *Eddy v. People*, 15 Ill. 386; *Henry v. Woods*, 77 Mo. 277; *Hale v. Finch*, 104 U. S. 261. The legal representative of the estate of Thomas N. Cockerill not having been made a party to said back tax suit, a sale of the said land was as to him and the defendant, *coram non judice*. *Rees v. City of Watertown*, 19 Wall. 106; 1 Story Eq. Jurisprudence, § 60; Constitution of Mo., Art. 2, § 30.

Wm. D. Bush and Samuel Davis for respondents.

James A. Clark, a defendant in the execution, was in possession of the premises by his tenant, Fizer, at the date of the plaintiff's purchase, at the date of her deed, at the date of the institution of this suit, and at the trial, and the plaintiffs are entitled to that possession which the defend-

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ants in the execution had. See *Matney v. Graham*, 59 Mo. 190; *Totten v. James*, 55 Mo. 494; *Boyd v. Jones*, 49 Mo. 202; *Peyton v. Rose*, 41 Mo. 257; *McDonald v. Snyder*, 27 Mo. 405. The defendant in the execution, Clark, could not set up an outstanding title in Cockerill; neither could Fizer, his tenant, set up such title in this action. See *Boyd v. Jones*, 49 Mo. 205; *Matney v. Graham*, 59 Mo. 190; *Laughlin v. Stone*, 5 Mo. 43. The back taxes for which the judgment was rendered, under which plaintiff purchased, were a prior lien on the land, (R. S., § 6832,) in favor of the State, the suit was to enforce it against the owner (§ 6837) and the trustee and all the *cestui que trusts* named in the mortgage from Clark were made defendants, and if the defendant, Cockerill, had a claim upon the land, it was secondary to the State's lien, and only gave him a right to redeem, which he did not insist upon at the trial.

MARTIN, C.—This was an action in ejectment in the usual form, for eighty acres of land, and was commenced February 20th, 1880. James A. Clark was the common source of title. The plaintiff, Mary E. Stafford, claimed as purchaser at execution sale effected on the 30th of October, 1878. This sale was in pursuance of a judgment in a certain proceeding commenced on the 18th day of June, 1878, by the collector of Saline county, against James A. Clark, J. Y. Stearne, trustee, and Daniel White, guardian of W. E. White, the object of which was to enforce the lien of the State for taxes upon said land for the years 1868 to 1876, inclusive, amounting in the aggregate to \$123.25, besides interest and costs.

The defendant, Fizer, had been in possession as tenant of Jas. A. Clark, but it is alleged in the answer that at the commencement of this suit he was tenant of H. Clay Cockerill. The defendants claim title by trustee's deed to H. Clay Cockerill, dated April, 1879, delivered in execution of the power of sale in a deed of trust made by said Jas. A. Clark in August, 1863, to J. Y. Stearne, as trustee, to

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secure certain notes therein described, one payable to Daniel B. White, guardian of William E. White, in the sum of \$8,635; one payable to John Y. Stearne in the sum of \$4,686.49, and a third payable "to the executors of the estate of Thomas N. Cockerill" in the sum of \$1,300. This deed of trust conveyed a great amount of other real property, as well as much personalty. The trustee was vested with the power of sale upon default of payment of the debts secured. It appeared that Henry Clay Cockerill was executor of Thomas N. Cockerill. These facts were set up by the defendants in their answer by way of equitable defense, and they asked to be allowed to redeem the land by payment of the taxes for which it was sold. The case was tried by the court without a jury; and upon the evidence it found that Fizer was, at the time of the judicial sale, in possession of the premises as tenant of Jas. A. Clark; that the title acquired by Mrs. Stafford at said sale was superior to the title of defendant, Cockerill, acquired at a sale under the deed of trust, and that she was entitled to possession of the land sued for. The defendants have appealed.

The principal question for us to determine is, whether the deed of a purchaser at execution sale under a proceeding to enforce the State's lien for taxes, is good against the beneficiary of a deed of trust, antedating the origin of the tax lien, who has not been made a party to the proceedings to enforce it. The record shows that the trustee and another beneficiary in the deed of trust were made parties to the tax lien suit, but that the executor of Cockerill, who held the note for \$1,300 was not included in the suit. The deed of trust was duly recorded, and no excuse for the omission is alleged in the petition or contained in the evidence. The learned counsel for the plaintiffs maintain that the complete title to the land passed to the purchaser by virtue of the execution sale, and that the omission of the beneficiary in question could not affect its validity. The precise question here presented has never been passed upon by this court. But the principles of law, as well as

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the decisions of this court governing the enforcement of liens on real estate, ought to furnish a sufficient guide for us in determining it. It will be observed that we are dealing with two liens, one created by law in favor of the State which necessarily takes precedence of other prior, as well as subsequent liens, on account of its peculiar character; R. S. 1879, §§ 6831, 6832; *Blossom v. VanCourt*, 34 Mo. 390; *McLaren v. Shieble*, 45 Mo. 130; *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Almy v. Hunt*, 48 Ill. 45; *Binkert v. Wabash Co.*, 98 Ill. 205; the other in favor of creditors, created by the act of the debtor. These two liens have been foreclosed and the purchasers stand opposed to each other with deeds under the proceedings respectively employed for enforcing them. The lien of the State is the superior one, although subsequent in time, a superiority invariably accorded to it in absence of some legislative declaration to the contrary. *Cadmus v. Jackson*, 52 Penn. 295; *Doane v. Chittenden*, 25 Ga. 103; *Hopper v. Malleson*, 16 N. J. Eq. 382; *Cooper v. Corbin*, 105 Ill. 224. No system of jurisprudence would command respect which failed to maintain and enforce the benefits of this priority by all necessary and reasonable proceedings to that end. When real estate was encumbered with two mortgage liens, and the owner of the first undertook to enforce it by suit, he could proceed to judgment without making the owner of the second a party defendant. But, in doing so, he accepted the consequences of leaving him unaffected by the proceeding. The second mortgagee was not, perhaps, a necessary party to a decree of foreclosure. He was a proper party, and if he was omitted from the proceedings the decree could not operate as a divestiture of his rights, 2 Jones on Mort., § 1394 (3rd Ed.); *Valentine v. Havener*, 20 Mo. 133; *Goodman v. White*, 26 Conn. 317. The second mortgagee holds a lien only on the equity of redemption, and a foreclosure of his lien gives to the purchaser under it, only the equity of redemption. As against a purchaser under proceedings foreclosing the prior mortgage, from which he has been omitted as a party,

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he possesses the right to redeem the land by payment of the debt for which it was foreclosed. In a proper proceeding to enforce this equity of redemption, he may acquire the absolute title. He could not successfully resist an action at law for the possession, because the title under the superior lien is the superior title at law. *Valentine v. Havener*, 20 Mo. 133. But since law and equity have been blended, he can resist and overcome this title by setting up his equitable defense in the right to redeem, and paying for decree of redemption. If the holders of the deed of trust, which in this case constitutes the second lien, had been made parties to the proceedings to enforce the tax lien the subsequent foreclosure of the deed of trust would fail to vest in the purchaser any right of redemption. He would be concluded by the decree on the tax lien. The name of the beneficiary in the deed of trust was omitted from the tax lien suit. The name of the trustee was not in my judgment an equitable substitute. A trustee in a deed of trust, having no other power or right over the land beyond the mere power of sale, does not, in my judgment, represent the beneficiary in other matters relating to the land. He has nothing to do with the rents and profits, insurance, taxes or possession of the land. He has no right to hold or manage it in any way for the use of the beneficiary. As a nominal trustee, for the sole purpose of making a sale under the powers conferred on him, he was not a competent party to foreclose by suit without joining the beneficiary with him. *Davis v. Hemingway*, 29 Vt. 438; 2 Jones Mort., §§ 1384, 1397 (3rd Ed.).

I do not find anything in the revenue act which relieves the collector from the operation of the general rule applying to the enforcement of liens, which requires the holder of the superior lien to make the owner of the junior or inferior incumbrance a party to the proceedings for enforcing the first lien, if he desires to divest him of his rights. Section 6837 provides, that all actions commenced under the provisions of chapter 145 shall be prosecuted in the

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name of the State, at the relation, and to the use of the collector "and against the owner of the property." "And in case of suits against non-resident, unknown parties, or other owners on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions, affecting real or personal property. In all suits under this chapter, the general laws of the State, as to practice and proceedings in civil cases shall apply so far as applicable, and not contrary to this chapter." R. S. 1879, § 6837. I do not see how to escape the conclusion that a *cestui que trust*, in a deed of trust, is an owner within the meaning of this act, if his interest is to be affected by the proceeding authorized. Any other conclusion would lead to great injustice, and would be such a manifest departure from "the practice and proceedings in civil cases," as sanctioned by the general laws of the State, as to forbid our accepting it in the absence of some express declaration to that effect. The difficulty in ascertaining the actual ownership of deeds of trust on account of the absence of recorded assignments, cannot result in any material embarrassment to the collector in bringing suit, since the decisions of *Vance v. Corrigan*, 78 Mo. 94, and *State v. Stultz*, justify him in proceeding against the owner as apparent of record, when in ignorance of the actual owner. No such embarrassments could have arisen in this case, the *cestui que trust* remaining owner, as evidenced by the deed of record.

In applying the principles we have considered to the case at bar, it is apparent that Mrs. Stafford has the superior title at law. The resistance of it by the defendants in their answer, setting up the right of redemption was not supported by the evidence at the trial. The equitable defense was entirely abandoned and is admitted by counsel for defendants to have been abandoned. The defendants neither offered the money for redemption, or asked for time to produce it. Neither was there any ruling of the court prohibiting them from proving the requisite amount of indebtedness

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to enable them to redeem. The equitable defense stands in the pleading and the case was closed without the proof to make it available. Under this state of things the plaintiff with her deed emanating from the superior lien was entitled to possession, as against the defendants holding under the junior or inferior lien. I may add here that this conclusion is supported by two decisions of this court on kindred issues. In *Olmstead v. Tarsney*, 69 Mo. 396, Hough, J., giving the opinion, it was held that in a suit instituted to enforce the lien of a special tax bill which antedated a deed of trust, the rights of the owner of the deed of trust would not be affected by the suit, if he was omitted as a party to it; and that his rights of redemption would remain to him. In the case of *Corrigan v. Bell*, 73 Mo. 53, opinion by Norton, J., the plaintiff brought ejectment as purchaser under a special tax lien judgment. One of the defendants, as in this case, defended as purchaser under a deed of trust recorded before suit was commenced on the tax lien. She made the same equitable defense set up as in this case and offered to redeem as against the tax lien title. It was held that as the *cestui que trust* was not made a party to the suit enforcing the tax lien, although the trustee in the deed was included as a party, her rights remained unaffected by the proceeding, and that she could resist an action in ejectment by asking for the enforcement of her equity of redemption. It is true that these two decisions were rendered in carrying out the equity of an act which provided that persons interested in the land sought to be charged, who were not made defendants should not be affected by judgment obtained in any suit on the tax lien created by the act, nor by any sale under such judgment, "and that if they claimed through or under any parties defendant prior to suit brought they might redeem from the purchaser or otherwise assert their rights according to equity and good conscience." This express reservation of their rights to parties interested in the land, who had been omitted in the proceeding to divest their interests is only

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declaratory of the law which has always been recognized in this State as governing the practice of enforcing liens against realty. *Valentine v. Havener*, 20 Mo. 133; *Farwell v. Murphy*, 2 Wis. 533; *Gower v. Winchester*, 33 Iowa 303; *Gritchell v. Kreidler*, 12 Mo. App. 497. In the absence of the express reservation contained in the act the conclusion reached by the court in the cases cited would have been the same. It could not have been otherwise without approving the repulsive practice of divesting a person of his rights and estates in land by virtue of a proceeding which omits both actual and constructive notice to him of its existence and progress. Whether the legislature has the power under our constitution to authorize a proceeding with such results need not be considered until it has clearly done so. There is nothing in our present revenue act indicating that they intended doing it in respect to tax liens.

In the course of the trial below, the defendants offered in evidence an agreement between the parties to this and other suits in which among other things it is stipulated that the tenant, Fizer, who was claimed to be the tenant of both parties, should remain in possession until March 1, 1880. This suit was commenced February 20, 1880, and it was argued by defendants that it was prematurely brought by about nine days. The object of the agreement was to effect an amicable disposition of the crops and rents of the property while the litigation of the title was in progress, and to secure the *terre tenant* in possession for the remainder of his year, whichever side succeeded in the controversy. The agreement contained a provision to the effect that it should "in no way interfere with or prejudice the rights of the said Cockerill or Stafford in regard to the title to said lands." The instrument was excluded by the court on the ground that it was made with reference to the litigation of the title and could not be invoked for the purpose of prejudicing the rights of the parties in such litigation. This ruling was correct. It is unnecessary to examine the instructions of the court.

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Upon the evidence and pleadings the plaintiff was clearly entitled to a judgment. Accordingly it is affirmed. All concur, except Hough, C. J., absent.

FREDERICK V. THE MISSOURI RIVER, FT. SCOTT & GULF RAILROAD COMPANY, *Appellant*.

1. **Estoppel.** Silence, in the absence of knowledge of one's rights, will not work an estoppel.
2. **Execution: LEVY: SHERIFF'S DEED.** Where, under an execution issued on a joint judgment against two defendants, the sheriff levies on land as the property of one of them, and sells and conveys the interest of the latter, his deed will not pass to the purchaser any interest the other defendant may have in the land.
3. **Ejectment: FINDING OF TRIAL COURT.** The evidence in this case held sufficient to support the finding and judgment of the trial court.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON, Judge.

AFFIRMED

Wallace Pratt for appellant.

(1) The claim of respondent that the title to the south half of the acre did not pass to Mary Frederick by the sale upon the execution is untenable, even if we concede that the father's name was not "John" but simply Henry Frederick, and that the deed of the five acres from Joseph Henry was to the respondent by the name of "John H. Frederick." The judgment was against the two upon a promissory note executed by them jointly, and was a lien upon the entire acre, whether the title was in the father as to the whole, or in him as to the north half only, and in the son as to the south half. (2) Whatever may be the

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effect of the execution sale and the deed to Mary A. Frederick, the respondent is equitably estopped from asserting any claim to the property in question as against the appellant. *Stows v. Barker*, 6 John. Ch. 166; *Wood v. Wilson*, 37 Pa. St. 379; *Chapman v. Chapman*, 59 Pa. St. 214; *Morgan v. Railroad Co.*, 96 U. S. 716; *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68; *Collins v. Rogers*, 63 Mo. 515; *Evans v. Snyder*, 64 Mo. 516; *Kelly v. Hunt*, 74 Mo. 561. (3) The respondent has twice knowingly received the proceeds of a sale for full value of the premises sued for, still retains these proceeds, and now wants the property itself. 1st, The proceeds of the execution sale of the acre, one-half of which he claims belonged to himself, were applied to the payment of the damages, interest and costs, of judgment against himself and his father, one-half of which he was equitably bound to pay. 2nd, Of the four thousand dollars, proceeds of the sale to Joy for the appellant, his mother had at the time of her death the two houses and lots purchased at a cost of \$1,950, and \$550 in money, the balance having been expended by her for her support. These houses and lots, and the money, aggregating more than his half of the proceeds of the sale, the respondent as we have already shown applied to his own use, and still retains the proceeds. *Austin v. Loring*, 63 Mo. 19; *Evans v. Snyder*, 64 Mo. 516. (4) The record in this case inevitably leads to the conclusion that for some unexplained reason, the legal title to the five acres purchased by the respondent from Joseph Henry, in 1856, was purposely taken in the name of the father, "John H. Frederick." (5) The sheriff's deed to Mary A. Frederick, recites a levy and sale of the land. But the granting part of the deed is of the right, title, interest and estate of Henry Frederick. No such granting clause was necessary, and it has no effect. 1 R. S. 1855, p. 748, § 57; 1 R. S. 1879, p. 401, § 2392. It is otherwise in case of sale of personalty, where a bill of sale is made 1 R. S. 1855, pp. 747, 748, § 53; 1 R. S. 1879, p. 400, § 2388. Also in case of

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deeds of real estate by administrators. 1 R. S. 1855, p. 147, § 35; 1 R. S. 1879, p. 79, § 169. And in case of deeds of realty by curator and guardian. 1 R. S. 1879, p. 435, § 2590; Freeman on Ex. §§ 324, 325.

Gage, Ladd & Small for respondent.

The history of the very title the appellant purchased showed that Henry and John H. Frederick were not the same person. The middle initial of a name in a deed, when the first and last names are given in full, is not a material part of the name, and a mistake in that letter is not a material mistake. *Phillips v. Evans*, 64 Mo. 23; *Orme v. Shephard*, 7 Mo. 606; *Franklin v. Talmage*, 5 Johns. 84. The failure of respondent to assert his title and claim his property from the time of the marshal's sale to the bringing of of this suit, whether the state of the title was known to him or not, constitute no estoppel against him. He had ten years under the statute within which to bring his action. The conduct of respondent when informed by Balis of his negotiations with Mary A. Frederick for the purchase of the property, will not estop him from claiming it. Silence will estop only when the party knows the fact which he ought to speak and the circumstances are such that his failure to speak is in morals and in conscience a fraud. *Henshaw v. Bissell*, 18 Wall. 255; *Robinson v. Justice*, 2. P. & W. (Pa.) 19; *Brewer v. Railroad Co.*, 5 Met. 484; *Chapman v. Chapman*, 59 Pa. St. 214; *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 14; *Smith v. Hutchinson*, 61 Mo. 83; *Taylor v. Zepp*, 14 Mo. 482; *Garhart v. Finney*, 40 Mo. 462; *Rice v. Bunce*, 49 Mo. 235; 31 Pa. St. 334; 14 Cal. 368; *Acton v. Dooley*, 74 Mo. 69; Bigelow on Estop., (3 Ed.) 504. The appellant did not make lasting or valuable improvements upon the property before suit was brought. Besides respondent is not shown to have known either of the improvements or his title when the suit was brought. The fifty feet purchased by respondent from his mother is no

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part of the tract purchased by appellant. The acceptance of a deed from his mother would not estop respondent as against her to deny the title, much less would it work an estoppel in favor of a stranger.

L. Traber also for respondent.

There is no evidence that respondent ever claimed and held out that his mother was the owner of the premises in question. It could not have been done by his silence in ignorance of his rights. *Bigelow on Estop.*, (3 Ed.) 497, 499; *Rice v. Bunce*, 49 Mo. 325; *Merrills v. Phelps*, 34 Conn. 109; *Taylor v. Ety*, 25 Conn. 250. As to appellant's third defense: it is true that respondent knew of the contemplated sale of the land in question by his mother to Joy, but it is equally true that from and after the sale by the marshal to his mother, until within a short time before the commencement of this suit, he was ignorant of his rights, and the true state of his title to the premises in question, and being so, for that reason did not make them known, and hence cannot be estopped. *Smith v. Hutchinson*, 61 Mo. 83, 87; *Bales v. Perry*, 51 Mo. 449; *Bigelow on Estop.*, (3 Ed.) 319, note 5; *Knouf v. Thompson*, 16 Pa. St. 357, 364. "It is not enough to raise an estoppel that there was an opportunity to speak, which was not embraced, nor is any duty generated by the mere fact that a man is aware that some one may act as to his prejudice if the true state of things is not disclosed." *Bigelow on Estop.*, (3 Ed.) 503; *Viele v. Johnson*, 82 N. Y. 32. "Silence without knowledge works no estoppel." *Acton v. Dooley*, 74 Mo. 63; *Viele v. Judson*, 83 N. Y. 40; *Horn v. Cole*, 51 N. H. 287; *Slevins v. Demit*, 51 N. H. 324; *Gregg v. Von Phul*, 1 Wall. 280. *Hill v. Eply*, 31 Pa. St. 331; *Chapman v. Chapman*, 59 Pa. St. 214; *Picard v. Sears*, 6 Ad. & Ell. 469; *Gregg v. Wells*, 10 Ad. & Ell. 90. There is no estoppel against respondent on the other grounds urged by appellant.

RAY, J.—We gather from the record in this cause, that on July 24, 1851, A. B. Canville, by deed of that date, conveyed to Henry Frederick, the father of respondent, forty by forty poles (10 acres) in the southern part of the east one-half of the northwest quarter of section 6, township 49, range 33, Jackson county, Missouri. The respondent, John B. Frederick, on March 10th, 1856, purchased from Joseph Henry five acres of land, twenty rods north and south and forty rods east and west, in the southeast part of the east half of the northwest quarter of section 6, township 49, range 33, in Kansas City, and lying south and adjacent to ten acres then owned and occupied by his father, with whom the respondent at that time lived. The deed from Joseph Henry for the five acres, so purchased by John B. Frederick, was taken in the name "John H. Frederick." The description in said deed was as follows: The south part of the east one-half of northwest quarter section 6, township 49, range 33, containing five acres more or less, bounded as follows: Beginning at the southeast corner of said east one half, thence north twenty poles, more or less to Henry Frederick's southeast corner, thence west with Frederick's line forty poles, thence south twenty poles, thence east forty poles to the place of beginning.

It seems that in 1857 the Fredericks sold to Ulysses Turner and others, fourteen acres of the fifteen, leaving one acre unsold, one-half of which was part of the ten acres originally owned and occupied by the father, and the other half of the five acres so purchased by the son from Joseph Henry. Said deed begins thus: "Know all men by these presents, that we, Henry Frederick and Mary A. Frederick, his wife, and John H. Frederick, son of the said Henry, and Mary Frederick, of the county of Jackson, State of Missouri," etc. In 1862 a judgment was recovered in the Kansas City court of common pleas by Theodore Etue, against John B. Frederick, the respondent, and Henry Frederick, his father, for \$210 and costs,

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upon a promissory note theretofore made by them, and upon the same an execution was issued January 30, 1863, and levied upon the one acre left of the fifteen after said sale and conveyance of the fourteen acres to Turner and others. Said levy was made on the acre "as the property of Henry Frederick." In the granting part of the deed the marshal described the property as, "all the right, title and estate of the said Henry Frederick in and to the real estate above mentioned." This acre, so levied upon, was afterwards, on May 25, 1865, sold under the execution by the marshal of said court to Mary A. Frederick, the mother of respondent, for the sum of \$365, and deed made to her accordingly. In July, 1865, the father died, leaving a last will and testament, signed with the name John Henry Frederick, whereby he gave to the son \$10, and devised all the rest of his property to his wife, Mary A. Frederick.

It seems that shortly after the execution sale to his mother, John B. Frederick moved away from the property in question to Wyandotte county, Kansas, leaving her in sole possession, and from that time till about the time of the commencement of this suit, in March, 1875, never made any claim to any part of it. In March, 1866, he purchased from his mother, for the sum of \$50, and took a conveyance thereof to himself, the south fifty feet of the acre, being a part of the five acres purchased by him of Joseph Henry, the deed to which was made to John H. Frederick. This fifty feet, he afterwards, in 1868, sold and deeded to Timothy Freeman. In February, 1868, Mary A. Frederick sold and deeded to Oliver Case the north fifty feet of the acre, and on October 24, 1868, for the consideration of \$4,000, sold and deeded to James F. Joy the balance of the same, being all of the acre except the fifty feet on the south, conveyed to John B. Frederick and the fifty feet on the north conveyed to Oliver Case. This purchase was made by Joy for the Missouri River, Fort Scott & Gulf Railroad Company, the defendant, and the \$4,000 paid to Mrs. Frederick was furnished by the railroad company.

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Immediately after the purchase by Joy, the railroad company entered into possession of the property, laid railroad tracks upon it, and has ever since occupied and claimed title therto. In 1872, Mary A. Frederick died intestate, leaving John B. Frederick, the plaintiff, her sole heir, who administered upon her estate. In March, 1875, John B. Frederick commenced this action of ejectment against the Missouri River, Fort Scott & Gulf Railroad Company to recover possession of the south half of the acre aforesaid, except the said south fifty feet purchased by him from his mother in 1866 and sold to Freeman.

The petition was in the usual form. The amended answer of the defendant contains first a general denial, and second a plea of estoppel *in pais*. On this behalf, the amended answer contains the following allegations, to-wit: "That so much of said acre as lies north of a line drawn parallel to the south line of said northwest quarter, and twenty poles north thereof was on the 24th day of July, 1851, conveyed by one A. B. Granville to the father of plaintiff, by the name of Henry Frederick; and that so much of said one acre as lies south of said parallel line was on the 10th day of March, 1856, purchased by plaintiff from Joseph Henry, and a deed of conveyance thereto taken in the name of John H. Frederick." It then charges that said Henry Frederick, the father, was then, and up to his death, known and called, by himself and others, by name of John H. Frederick, as well as Henry Frederick, and that said Joy and defendant, at the purchase supposed and believed that the person named, and to whom said deed was made, was the said father of the plaintiff. Said amended answer then set up the recovery of said judgment, by Theodore Etue, in December, 1862, against Henry Frederick, the father, and John B. Frederick, the plaintiff, the issue of execution thereon, and levy of same upon said acre, as the property of Henry Frederick; a sale and conveyance in pursuance thereof, on May 25th, 1865, by the marshal to said Mary Frederick, and a sale and conveyance of said one

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acre of land, (except the fifty feet sold to plaintiff, and the fifty feet sold Oliver Case, as aforesaid) by Mary A. Frederick, on October 24th, 1868, to James F. Joy, for the use and benefit of the railroad company, defendant. It then charges, in substance, that Mary A. Frederick, the plaintiff, and said Henry Frederick up to his death, at all times, from and after said marshal's sale, and up to the sale and conveyance of the land in question to defendant, gave out that said Mary A. Frederick was the absolute owner of the land in question, and with the knowledge and consent of plaintiff, had and held the possession thereof, as the absolute and undisputed owner; and with like knowledge and consent of plaintiff, sold and conveyed the same to Joy for defendant. That plaintiff was present at said sale, so made by his mother to defendant, and made no claim nor asserted any right, title or interest in or to the land in question. That plaintiff well knew the matters and things aforesaid, and that the title to the whole of said acre, before said marshal's deed, appeared in the name of his father, and that defendant supposed and believed that his mother was the sole and absolute owner thereof; yet the plaintiff stood by and saw the defendant take possession and make valuable and lasting improvements on said land without objection. That plaintiff purchased from his mother, after the marshal's sale to her, fifty feet off of the south end of that part of the acre, which lies south of the ten acre tract, and accepted a deed from her for the same, and afterwards sold and conveyed the same to T. M. Freeman. That Henry Frederick, the father of plaintiff, died shortly after the marshal's sale to his wife. Leaving a will executed by him in the name of John Henry Frederick, by which he devised all his property, real and personal, to Mary A. Frederick, his wife, except the sum of \$10 bequeathed to the plaintiff. That the mother afterwards died intestate, leaving the plaintiff her only heir, who administered on her estate, and inherited and received her estate, including the proceeds of what she got from defendant, for the sale of the acre in

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question. The answer then further charges, that the plaintiff now says, and claims that he is the person meant and intended as grantee in said deed from Joseph Henry to "John H. Frederick;" that the part of said acre south of said parallel line aforesaid, was not conveyed by virtue of the marshal's deed aforesaid to said Mary A. Frederick; that said Mary A. Frederick was not the owner thereof, at any time; and that he is the owner thereof, and entitled to the possession; but the defendant says, that by reason of the matters and things hereinbefore stated, the said plaintiff is now *estopped* and precluded from making, setting up, or having any right, title or interest in or to said parcel of land, so purchased by defendant and said Joy, or any part or portion thereof, and from obtaining the possession thereof. Wherefore the defendant asks judgment for its costs, herein laid out and expended, and that it go hence.

To this plea in estoppel the plaintiff filed a special reply, in which he denies that said Henry Frederick was ever known or called by the name of John H. Frederick, as charged; or that said Joy or defendant at the time of said purchase, supposed or believed that the person named in said deed of Joseph Henry to John H. Frederick, as John H. Frederick, was the said Henry Frederick, as stated. The plaintiff then states that said marshal sold, at said execution sale, the right, title and interest of said Henry Frederick in and to said acre of land, and no other right, title or interest whatever, and that said marshal in and by his deed, made in pursuance of said sale, conveyed, and undertook to convey the said right, title and interest of said Henry Frederick and no other, and that plaintiff's estate in and title to the premises in controversy were in no manner conveyed or affected by said levy, sale or deed. Plaintiff denies that he, the plaintiff, or said Henry Frederick, at any time, claimed or gave out, that said Mary A. Frederick sold or conveyed said premises with his knowledge or consent; or that said Mary A. Frederick ever had, or held, said premises as her own with his consent. Plaintiff, how-

ever, states that after the marshal's sale, mentioned in the answer, his mother, Mary A. Frederick, informed him that she had purchased his estate and interest in the premises sued for, and that the same had been levied upon, sold and conveyed to her by said marshal; that, in point of fact, said information was not true; but that plaintiff having no other information on the subject, was led thereby to suppose and believe that his said estate and interest in said premises had been so sold and conveyed to his mother, and that she thereby became and was the owner thereof, and having no other or further information in the premises, he continued in such false supposition and belief, until a short time before the institution of this suit; and that immediately upon receiving information that his estate and interest in said premises had not been sold, or conveyed by said marshal, he caused this suit to be brought. That at the time his mother so informed him of her pretended purchase of his interest she with his father was living upon the premises, and that, thereafter, he made no effort to dispossess them, because he had been so misled by the false information so communicated to him by his mother; and that her occupation thereof, thereafter, as her property, was not with his knowledge or consent. Plaintiff denies that his mother sold the premises in question to Joy, or the defendant, with his knowledge and consent, or that, prior to defendant's pretended purchase, he had any knowledge whatever, of defendant's intention to purchase; or that defendant supposed or believed that his mother was the owner thereof, or that defendant did so suppose or believe. Plaintiff denies that he was present at any negotiation between defendant and his mother, in reference to said sale or purchase; or had any knowledge or information thereof, prior thereto; or that defendant was led or induced, by the matters or things stated in said answer, or by any act, word or deed of his, in any manner to make said purchase or pay, for said premises; or that defendant was led or induced to take possession or improve said property by any

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act, word or deed of his ; or that defendant, did possess or improve the same, with his knowledge and consent ; or that plaintiff received any part of the purchase money, or the proceeds thereof, of said pretended sale, by his mother to defendant.

Plaintiff also denies that the title to said premises in controversy ever appeared in the name of his father, the said Henry Frederick, and on the contrary, he states that his deed for said premises, mentioned in the answer, from Joseph Henry was, at the time of said Joy's pretended purchase, and for many years prior thereto, and for many years prior to said marshal's sale, had been duly and legally recorded in the proper office, and that Joy and defendant had due notice thereof, at and before said pretended purchase. Plaintiff denies that defendant made said pretended purchase without any knowledge or information of his interest and title thereto ; or that it has made any valuable or lasting improvements thereon, except a single railroad track of little value across one corner thereof, or that the value of said premises has been materially advanced thereby ; and plaintiff further states that the premises in controversy were conveyed to him, by said Joseph Henry, in and by said deed, dated the 10th of March, 1856, and that he was and is the grantee named in said deed, as John H. Frederick, and that of this fact defendant and Joy had full notice, and well knew, at and before said pretended purchase from his said mother, etc., etc. Plaintiff states that it is not true, as charged in the answer, that he led or induced defendant to purchase said premises ; or that he, after the marshal's sale, and the information thereof, so given by his mother, or at any time before or during the negotiations for said sale between his mother and defendant, had any knowledge of his rights or interest in the premises ; or that he, in any manner or any time failed to claim or assert his title to the premises, when he might or should have so done ; or that he led or induced the defendant to make said purchase ; or that he is, or was, in any way, responsible

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for the purchase so made, and on the contrary, he charges that defendant made and was led and induced to make said purchase upon its motion, information and knowledge of the facts derived from sources within its reach, search and inquiry, altogether foreign to this plaintiff, or to any act, word or deed of his, or to any failure of his to claim or assert his title at any time when it was his duty so to do.

Whereupon plaintiff denies that he is, or in justice should be estopped from now claiming and asserting his rights and title to the premises in question; or from recovering the possession thereof, as claimed and asserted in his petition. Such at least, is the substance and legal effect of the material parts of said answer or plea in estoppel, and the reply thereto.

At the trial, as shown by the record, the parties having waived a jury, and the testimony being all in, the cause was submitted to the court on the pleading and evidence, without instructions or declarations of law; and the court after full hearing and consideration thereof, found substantially all the material issues in favor of the plaintiff and rendered judgment accordingly, from which the defendant after an unsuccessful motion to set aside said finding and judgment and grant a new hearing, appealed to this court.

The causes for said new hearing as set out in the motion, are as follows: 1st. Said judgment and decree are against the law and the evidence in the cause. 2nd. On the evidence and proofs the finding and judgment should have been for defendant, and not for plaintiff. 3rd. On the law and the evidence, the judgment is erroneous. 4th. Judgment is not supported by the findings. 5th. The court erred in excluding competent evidence offered by defendant, and in admitting illegal evidence offered by the plaintiff.

This motion, as the record shows, was taken up, considered, and overruled by the court, to which action of the court in so doing, the defendant duly excepted, and as before stated, brings the case here for review. The record

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shows that at the trial, the parties respectively introduced, in evidence the deeds, title papers and documents mentioned upon which they relied, together with a large mass of oral evidence, touching the points in controversy, and which in many particulars was conflicting and contradictory, and need not here be set out in detail, but such parts thereof as may be deemed material and pertinent will be noticed, in the progress of this opinion.

The leading and material points, in controversy, were: 1st, Who was the *grantee* in the deed from Joseph Henry, for the land in controversy? or whether the father Henry Frederick, or the son John B. Frederick, was the party named therein, and to whom said conveyance was in fact made? and subsidiary to this question, was another, and that was, whether the father was known and called by the name of "John H. Frederick," as well as Henry Frederick? 2d, Whether the title, interest and estate of the plaintiff, if he had any, in and to the premises in suit, *passed* by the marshal's deed in question to Mary A. Frederick, the mother of plaintiff? 3d, Whether the defendant, in making said purchase from Mary A. Frederick, was led or induced thereto, by any act, word, deed or conduct of the plaintiff; and if so, whether the plaintiff, at the time, was aware of his rights and title to said property; or whether the defendant, in making said purchase, was led and induced thereto by its own information, search and inquiry, otherwise derived. 4th, Whether, after said purchase by defendant from Mary A. Frederick, the plaintiff, with knowledge of his rights and title to the property in question, if he had any, stood by and saw the defendant take the possession and make the improvements thereon, without objection, or notice to defendant of his said claim and title, etc.; and, 5th, Whether under the evidence in the cause, the plaintiff is estopped from claiming or setting up his title to said property, by reason of his conduct in the premises, and the law applicable thereto. These we think are the material and controlling questions in the case. Of

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these, in the third, most elaborately pressed upon our attention by appellant's counsel are, 1st, the *identity* of the grantee, in the deed from Joseph Henry; 2d, the force and effect of the marshal's deed in question; and lastly, the general question, whether the plaintiff is estopped by his conduct from now setting up or claiming title to the premises in question.

As before stated no instructions or declarations of law were given, asked, or refused. The cause, being thus submitted to the court, upon the pleadings and evidence in the cause, the findings of the court, upon all the material and controlling points and questions, as shown by the special findings in the record, were substantially in favor of the plaintiff, and judgment accordingly. Among the findings of the court, it appears that the court found substantially that the plaintiff was and is the grantee in said deed from Joseph Henry; that the title of the plaintiff did *not* pass by the marshal's deed in question; that the defendant was not led or induced to make said purchase by the acts, words or conduct of plaintiff; that the plaintiff from and after the marshal's sale, and the information thereof given him by his mother, was led to believe and did believe that his mother had purchased his interest and had a conveyance therefor, and that he never knew any better, until, just before this suit was brought; that the evidence failed to show that plaintiff did or said anything; or by his conduct led or induced the defendant to make the purchase in question, or that he had knowledge or consented to defendant's possession or improvements upon said land, as charged in the answer. These, we think, are substantially the material findings of the court, in the premises. There are other special and minor findings that, in no way, alter or change the result.

On the question of the identity of the grantee in the deed from Joseph Henry in question, it was proved by the testimony of the plaintiff and also by that of M. J. Payne, who was present at its execution, and who wrote the same,

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that the plaintiff was the grantee therein, and the person named therein as such. The proof on this point is also strongly corroborated by the weight of all the facts and circumstances in evidence. Indeed, there seems to be no just cause to doubt this position. There is but little evidence to the contrary. The preponderance of the evidence, also, shows that the name of the father was Henry Frederick, and not John H. Frederick, as claimed by defendant. There is some evidence of his having made and received documents and papers by the name of John H. Frederick, and it is conceded that he made and executed his will by the name of John Henry Frederick; but these are exceptional acts, while the great bulk of the testimony shows conclusively, we think, that his name was Henry Frederick, and not John H. Frederick.

The evidence, we think, is equally satisfactory that the defendant in making said purchase from Mrs. Frederick, was not led or induced thereto by the alleged acts and conduct of the plaintiff; that his presence at one time, when this trade was talked of between Mrs. Frederick and the agent of defendant, and his failure under the circumstances to object or assert his title, had very little if anything to do in leading to or bringing about said sale. In fact, the trade seems to have been already agreed to before the plaintiff knew anything about it, so far as the testimony shows. It is also quite manifest we think, that the plaintiff at that time, as well as prior and subsequent thereto, was ignorant of his rights and title to the property in question, and that he had been led and induced to believe that his title had been sold and conveyed by the marshal's deed in question, by the information so received from his mother, and that at that time he was laboring under an honest mistake and belief that he had no title.

We think also that the finding and construction of the trial court as to the force and effect of the marshal's deed was correct. It is true that the judgment of the court on which the execution issued, and under which the levy,

sale and deed of the marshal were made was a joint judgment against the plaintiff and his father, Henry Frederick, and that said judgment was a lien upon the interest of both the father and son, in their respective pieces of property by them so owned at the time, and that the interest of the son as well as the father, might have been levied on, sold and conveyed by the marshal's deed, but it is equally true that in point of fact, it was neither levied on, sold or conveyed by said deed, and that the deed on its face so shows. The recitals are, that the one acre in question, of which the plaintiff's tract was a part, was levied on, "as the property of Henry Frederick," that it was sold as such, and the deed recites that the said marshal did, thereby, "give, sell and convey unto the said Mary A. Frederick, all the right, title and estate of the said Henry Frederick in and to the real estate above described." It is manifest that the interest of the plaintiff did not pass by said deed, nor does the deed upon its face purport to pass the same. This being so, it is equally clear that her deed to defendant did not and could not pass it, she having no other claim to the land in question.

On all the material questions of fact, controverted by the testimony, and submitted to the court for trial and decision, we think, the evidence in the cause was and is amply sufficient to sustain and justify the findings of the court. Its finding and construction, as to the force and effect of the marshal's and other deeds and documents in evidence, was and is, we think equally just and correct.

The force and effect of the doctrine of estoppel *in pais*, as pleaded in this case, as well as the application of the law to the facts in evidence as here, is well illustrated by the authorities cited in respondent's brief. Others to the same effect, from this court and elsewhere might be added if necessary.

Other and minor points have been urged in argument, but we deem them unimportant to the proper disposition of the case. Other and different authorities are also cited in

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the able brief of appellant's counsel; but upon the whole case and all the authorities, we think the cause was properly tried and disposed of by the trial court, and its judgment is, therefore, affirmed. All concur.

THE CATHOLIC CHURCH, at the City of Lexington, v. TOBBEIN
et al., Appellants.

1. **Corporation: EXISTENCE DE JURE, HOW DETERMINED.** Whether or not a corporation exists *de jure*, cannot be determined in a collateral proceeding, if it appear to be acting under color of law and recognized by the State as such. The question of its being must be raised by the State itself on a *quo warranto* or other direct proceeding; and this is the case, although the act incorporating it or authorizing its incorporation is violative of the constitution of the State.
2. **Constitution: RELIGIOUS CORPORATION.** Under section 8, article 2 of the present constitution, there can be no incorporation in this State of a church for a religious or other purpose, except such as may be created under a general law for the sole purpose of holding title to such real estate as may be prescribed by law for a church edifice, parsonage and cemetery.
3. **Church Organization: INCORPORATION.** A church organization for religious purposes, continues after the incorporation of the religious body for the purpose for which such incorporation is authorized by the constitution.
4. **Church: WILL: INCORPORATION.** A testator willed certain real and personal estate to the Catholic Church at the city of Lexington. Subsequently and after the taking effect of the will, the plaintiff was incorporated under the same name as that of the church organization, which name it seems to have adopted with reference to the provisions of the will. *Held*, the plaintiff, by its incorporation, did not acquire any of the property rights of the Catholic Church organization at the city of Lexington. Whether or not the church at Lexington, as distinguished from the corporation of that name, can receive and hold the property bequeathed and devised to it, can be determined only in a suit instituted by that church.

Appeal from Livingston Circuit Court.—HON. J. M. DAVIS,
Judge.

REVERSED.

Smith & Krauthoff with *Broadbuss & Davis* for appellants.

1. The attempted incorporation of the plaintiff was void. Const., art. 2, § 8; *State v. Patten*, 62 Mo. 444; *State v. Holladay*, 66 Mo. 385; *Fusz v. Spaunhorst*, 67 Mo. 256; *State v. Railway Co.*, 74 Mo. 163; *State v. Van Every*, 75 Mo. 530; *Chicora Co. v. Crews*, 6 Rich. (N. S.) 243, 275; *Endowment Co. v. Satchwell*, 71 N. C. 111. The rule that the State alone can question its corporate existence, has no application except in cases where there is a *de facto* corporation and the regularity of its organization, or where the power of a legally organized corporation to do a given act or to make a certain contract is at issue. Here, no corporation *de facto* is shown to exist. *Methodist Church v. Pickett*, 19 N. Y. 482; *Slocum v. Warren*, 10 R. I. 124; *People v. Phoenix Bank*, 24 Wend. 431; Abb. Trial Ev., p. 20, § 5. And where, as here, the attempted incorporation is absolutely void, the objection can be made by any one. *Heaston v. Railroad Co.*, 15 Ind. 275; *Snyder v. Studebaker*, 19 Ind. 462; *South Ottawa v. Perkins*, 94 U. S. 260, 267; *St. Louis Drug Co. v. Squires*, 81 Mo. 18. 2. But even if it is held that the corporate existence of the plaintiff cannot be raised in this proceeding, yet its power to take under the will is open to inquiry—the plaintiff already holds all the property which the constitution permits it to hold, and it stands incapacitated from taking in excess thereof. *Blair v. Ins. Co.*, 16 Mo. 559, 565; *Hann. & St. J. R. R. Co. v. Marion Co.*, 36 Mo. 294, 303; *Bank of Louisville v. Young*, 37 Mo. 398; *Coleman v. S. R. T. R. Co.*, 49 Cal. 517, 522; *State v. Commissioners*, 3 Zab. 510; *State v. Newark*, 1 Dutch. 315; Green's Brice's *Ultra Vires*, (2 Ed.) p. 29, note a. And this

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point may be insisted on by any person interested in the estate. *Harris v. Bible Society*, 2 Abb. N. Y. Dec. 316; *Bridges v. Pleasants*, 4 Ire. Eq. 26; *Chamberlain v. Chamberlain*, 43 N. Y. 439; *U. S. v. Fox*, 94 U. S. 315. 3. The plaintiff has no interest in this property, for it was not incorporated until long after Tobbein's death, and there is no conveyance to it from the incorporated church referred to. *Frank v. Drenkhahn*, 76 Mo. 508. 4. The devise to the church is void, because to an artificial body not *in esse* at the date of the testator's death. It cannot be upheld as a charitable use. This comprises both a valid trust and a use for a purpose declared charitable in law. No other can be upheld as a charitable use either under the statute of 43 Elizabeth or the general powers of a court of chancery. 2 Story Eq. Jur., (12 Ed.) § 979 a; *Owens v. Missionary Society*, 14 N. Y. 380, 406; *Downing v. Marshall*, 23 N. Y. 356, 382; *Dashiel v. Att'y Gen'l*, 5 Har. & Johns. 400; *Sherwood v. Bible Society*, 1 Keyes 561, 566; *Grimes v. Harmon*, 35 Ind. 198, 204. In this will, no trustee is appointed in the first stead—the executor not being such. *Holmes v. Mead*, 52 N. Y. 334; *Bascom v. Albertson*, 34 N. Y. 584. Nor can the devisee be said to be the trustee, for the estate devised is unlimited and absolute, and claimed as such; in such a case there can be no trust. *Gibbs v. Rumsey*, 2 Ves. & B. 297; *Fowler v. Garlike*, 1 Russ. & Myl. 232; *Meredith v. Heneage*, 1 Simon 542. To uphold a devise as a charitable use, the will itself must define a charity and limit to such a use. 2 Story Eq. Jur. (12 Ed.) §§ 1155, 1158; *Morice v. Bishop of Durham*, 9 Ves. 399; *s. c.* 10 Ves. 522. Nor does it appear that the objects of the plaintiff are such that the use would be a public one in its nature. *Att'y. Genl. v. Hewer*, 2 Vern. 387; *Ommancy v. Butcher*, 1 Turn. & Russ. 260; *Sherwood v. Bible Soc.*, *supra*; 2 Story Eq. Jur. (12 Ed.) § 1183; 2 Perry on Trusts, (3 Ed.) § 710. The fact that plaintiff is a church or a religious society does not obviate these objections. *Owens v. Missionary Society*, 14 N. Y. 380, 385, 411; *Heiss v. Murphy*, 40 Wis. 276. A society whose

benefits and benevolence are confined exclusively to its own members, is not a charitable use. *Babb v. Reed*, 5 Rawle 151, 158; *Swift v. Eaton Society*, 74 Pa. St. 362; *Att'y Gen'l v. Federal Street Meeting House*, 3 Gray 1, 44 to 52. In this case the question of the character of the property, whether real or personal, and if the latter, whether pure or impure, is immaterial. *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Ackroyd v. Smith*, 1 Brown's Ch. 503; *Baptist Church v. Robberson*, 71 Mo. 326, 331. This testator having evidently intended to designate a specific object of his bounty and not declared a general charitable intention, as the bequest cannot vest in the first instance, a court of equity has no power to appoint or substitute a donee—not even if it had the power of *cypres*. 2 Perry on Trusts, (3 Ed.) § 726. 5. Nearly all of the cases cited by respondent are not open to these objections, and are plainly distinguishable from the case at bar. 6. The estate devised to the church, if the will was valid in the first instance, was a contingent remainder, the remainder being uncertain and not then *in esse*, (1 Broom & Hadley's Com.) (Wait's Ed.) pp. 623, 624, 627, 628; 2 Greenl. Cruise, 202, 249; *Williamson v. Field*, 2 Sandf. Ch. 533; and as the life estate of the widow was destroyed by the renunciation of the will by her, this contingent remainder being left without an intervening estate to support it, was thereby destroyed, and the property goes to the next of kin. 2 Washb. Real Prop. (4 Ed.) pp. 541, 542, 548, 569, 608, 609; 2 Blackst. Com. 169; 4 Kent's Com. 202, 208; *Hall v. Nute*, 38 N. H. 422; *Hayes v. Tabor*, 41 N. H. 521. This clause of the will cannot be sustained as an executory devise. It has none of the elements of such an estate. 4 Kent's Com. 270; 24 Pick. 155; *Wead v. Gray*, 78 Mo. 60; *Gould v. Orphan Asylum*, 46 Wis. 117; *Inglis v. Snug Harbor*, 3 Peters 99, 115, and Judge Story's opinion, pp. 150, 151, 152 and cases cited.

Mansur & McLaughlin and *Alex. Graves* for respondent.

The objection that the respondent was not incorpo-

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rated at the date of the will and that, therefore, the devise must fail is untenable upon the best authority, and this for the reason that the devise in question is for a charitable or pious use which at common law was good, although the devisee was unincorporated. *Evangelical Association's Appeal*, 35 Pa. St. 316; *Pickering v. Shotwell*, 10 Pa. St. 23; *Zeiswiss v. James*, 63 Pa. St. 465; *Zimmerman v. Anderson*, 6 Watts. & Serg. 218; *Bethlehem v. Perseverance Co.*, 81 Pa., 457; *Curling v. Curling*, 8 Dana (Ky.) 38; *Cabell v. Bigger*, 8 B. Monroe, 211; *Burr v. Smith*, 7 Vt. 276; *Stone v. Griffin*, 3 Vt. 400; *Smith v. Nelson*, 18 Vt. 511; *Gould v. Orphan Asylum*, 46 Wis. 115; *Dodge v. Williams*, 46 Wis. 72; *Beatty v. Kurtz*, 8 Curtis 212; *Vidal v. Girard*, 2 How. 197; *Paulet v. Clark*, 9 Cranch.; *Inglis v. Snug Harbor*, 3 Pet. 99; *Estate of Benjamin Ticknor*, 13 Mich. 55; *Everett v. Carr*, 59 Me. 33; *Swasy v. Am. Bible Soc'y*, 57 Me. 523; *Preachers' Aid Soc'y v. Rich*, 45 Me. 552; *DeCamp v. Dobbins*, 29 N. J. Eq. 50; *Duke v. Fuller*, 9 N. H. 538; *Parker v. Carroll*, 16 N. H. 149; *Tucker v. Seaman's Aid Soc'y*, 7 Met. (Mass.) 188. The validity of a will depends not upon the law in force at the time when signed, but at the time when the testator's death occurs. *De Peyster v. Clendening*, 8 Paige 295; *Doubleday v. Newton*, 27 Barb. 431; *Dodge v. Williams*, 46 Wis. 106. The objection of appellants is not sound that the law of Missouri does not authorize the incorporation of respondent, and that the provisions of chapter 21 of R. S. 1879, so far as the same applies to such bodies as the respondent, are violative of the state constitution and therefore void. Cons. of Mo. of 1875, § 8, Art. 2; §§ 8, 11, Art. 12; R. S. 1879, §§ 706, 707, 974, 977; *Burr v. Smith*, 7 Vert. 281; 2 Kent Com. (12 Ed.) 282; *Chambers v. St. Louis*, 29 Mo. 575. Section 13, article 1 of constitution of 1865 has been wholly abrogated by the constitution of 1875, which has left the matter concerning personal property where it was at common law. If a corporation in holding and purchasing real estate exceeds her powers, it is for the government to exact a forfeiture of her

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charter. *Chambers v. St. Louis*, 29 Mo. 576; *City of Jefferson v. Curry*, 71 Mo. 86; *Martindale v. Railroad Co.*, 60 Mo. 508; *Jones v. Hoberham*, 107 U. S. 188. The testator really left nothing but personality. Where the whole scope and tenor of a will, as here, demonstrates that the power of sale of land named therein is mandatory, it will be considered a will of personalty. *Gould v. Orphan Asylum*, 46 Wis. 117; *Taylor v. Benham*, 16 Curtis 387; *Peter v. Beverly*, 10 Peters 532; 3 Wheat. 563; 5 Paige 318; *Bogert v. Hertell*, 4 Hill 495; *Seymour v. Freer*, 8 Wall. 214; 1 Scribner on Dower 429. The devise is not avoided by the act of the testator's widow in renouncing the provisions of the will.

HENRY, J.—Plaintiff, as a corporation, instituted this suit in the circuit court of Caldwell county to establish a certain paper writing, as the last will and testament of Ilett Tobbein, deceased, which having been offered for probate to the probate court of Caldwell county was rejected. This cause was taken by change of venue to the circuit court of Livingston county, where plaintiff obtained a judgment, from which defendants have appealed.

Ilett Tobbein died in September, 1879, leaving as his last will and testament the paper writing in question, which contained the following devises and bequests, viz.: To his wife, if she survived him, a life interest and estate in and to all his property, consisting of real estate and personalty, with full power to manage, control and use it, during her life, and, at her death, to her legal heirs one half of all of his estate, and the other and remaining half to the Catholic Church at the city of Lexington, in the State of Missouri. The other dispositions of his property, were upon condition that he survived his wife, and, she having survived him, it is not necessary to notice them. Before the institution of this suit, Mrs. Tobbein renounced the provisions of the will, and made her election to one-half of the estate absolutely.

Tobbein left no issue, and defendants are his widow and heirs at law.

One of the principal questions discussed by the briefs of counsel relates to the corporate existence of the plaintiff, which was put in issue by the answer.

In the *The City of St. Louis v. Shields*, 62 Mo. 252, this court expressly sanctioned the doctrine laid down by Judge Cooley in his work on Constitutional Limitations, page 254, that whether a corporation exists *de jure* or not, its existence cannot be questioned in a collateral proceeding, if it appear to be acting under color law, and recognized by the State as such. The question of its being must be raised by the State itself, on a *quo warranto* or other direct proceeding; and this, although the act incorporating it, or authorizing its incorporation, is violative of the constitution of the State.

But there is another question decisive of the case against plaintiff if answered in the negative, viz: Did the incorporation of the plaintiff vest in it the property rights of the Catholic Church at the city of Lexington? The will took effect before plaintiff was incorporated and the provision in Tobbein's will was for the Catholic Church at Lexington, and not to the plaintiff corporation, which it seems adopted its name with reference to that provision of the will, and stands upon no better footing in this controversy than if it had a different corporate name. The Catholic Church at Lexington did not lose its existence or organization in the incorporation of the plaintiff by the same name. Our constitution provides that: "No religious corporation can be established in this State, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries." Const. 1875, art. 2, § 8. There can, therefore, be no incorporation of a church for religious or other purposes in this State, except only for the sole purpose of holding the title to such real estate, and the quality as may be prescribed by general law

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for a church edifice, a parsonage and a cemetery, and consequently the church organization for religious purposes must continue after the incorporation of the religious body for the sole purpose for which such incorporations are authorized by the constitution. The plaintiff did not acquire by its incorporation any of the property rights of the Catholic Church at the city of Lexington, and, therefore, cannot maintain this action. The case of *Frank v. Drenkhahn*, 76 Mo. 508, is directly in point. Whether the Catholic Church at Lexington, as distinguished from the corporation of that name, can receive and hold the property bequeathed and devised to it by Tobbein can be determined only in a suit instituted by that church. The judgment is reversed. All concur except HOGAN, C. J., absent.